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THE
AMERICAN PROBATE REPORTS:

CONTAINING

RECENT CASES OF GENERAL VALUE DECIDED IN
THE COURTS OF THE SEVERAL STATES ON
POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

BY
CHARLES FISK BEACH, JR.

VOL. V.

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42

TABLE OF CASES REPORTED.

	PAGE
ALLEN <i>v.</i> CRAFT, (109 Ind. 476)	365
TRUST.—ESTATE TAIL.—THE RULE IN SHELLEY'S CASE.	
ALSUP <i>v.</i> CLARKE, (15 Lea, 71)	497
BEQUEST FOR THE "COMFORTABLE SUPPORT" OF RELATIVES.	
BALDWIN <i>v.</i> SPRIGGS, (65 Md. 373)	85
REVOCATION BY BIRTH OF CHILDREN.—PROVISION FOR AFTER-BORN CHILDREN.	
BALLENTINE <i>v.</i> WOOD, (42 N. J. Eq. 552)	241
RESIDUARY DEVISE.—VESTED REMAINDER.—DISTRIBUTION OF MONEY IN THE HANDS OF TRUSTEES.	
BARTLETT <i>v.</i> SLATER, (53 Conn. 102)	130
GIFT OF INCOME.—INTEREST.—ANNUITY.	
BEARDSLEY <i>v.</i> SELECTMEN, &C., (53 Conn. 489)	298
CONSTRUCTION OF A WILL.—BEQUEST FOR CHARITABLE PURPOSES.—UNCERTAINTY.	
BRIGGS <i>v.</i> BRIGGS, (69 Iowa, 617)	489
AFTER-ACQUIRED REAL ESTATE.	
BRISTOL <i>v.</i> BRISTOL, (53 Conn. 242)	332
BEQUEST FOR CHARITABLE USES.—TRUSTS.—UNCERTAINTY.	
BRONSON <i>v.</i> PHELPS, (58 Vt. 612)	231
CONSTRUCTION OF A WILL.	
BRYAN <i>v.</i> MORING, (94 N. C. 694)	8
DEVISAVIT VEL NON.—HEIR.—RECEIVER.	

	PAGE
BUCHANAN <i>v.</i> LLOYD, (64 Md. 306)	30
CONSTRUCTION OF A WILL.—CODICIL.—ADDED LEGACY.	
CARROLL <i>v.</i> BONHAM, (42 N. J. Eq. 625)	389
NUNCUPATIVE WILL.	
CHAMBERLAIN <i>v.</i> TAYLOR, (105 N. Y. 185)	508
CHARITABLE BEQUESTS.—EXPRESS TRUST.	
CLINE <i>v.</i> JONES, (111 Ill. 563)	341
DISTINCTION BETWEEN A DEED AND A WILL.	
CUMMINGS <i>v.</i> COREY, (58 Mich. 494)	222
CONSTRUCTION OF A WILL.—EXECUTOR AS TRUSTEE AND BENEFICIARY.	
CUSHING'S WILL, (58 Vt. 393)	295
ANNUITY IN LIEU OF DOWER.—APPORTIONMENT.—INTEREST.	
EMERY <i>v.</i> BATCHELDER, (78 Me. 233)	377
DEFICIENCY OF ASSETS.—RIGHTS OF ANNUITANTS AND GENERAL LEGATEES.	
FARNAM <i>v.</i> FARNAM, (53 Conn. 261)	103
BEQUESTS TO CHILDREN AND GRANDCHILDREN.—PERPETUITIES.—TRUSTS.—AFTER-BORN CHILDREN.	
GERRY, MATTER OF, (103 N. Y. 445)	55
LIFE ESTATES AND REMAINDERS IN STOCKS OR BONDS.	
GIBBENS <i>v.</i> GIBBENS, (140 Mass. 102)	92
CONSTRUCTION OF A WILL.—GIFT TO CHILDREN UPON THE DEATH OF THE WIFE.	
GIDDINGS <i>v.</i> TURGEON, (58 Vt. 106)	201
EVIDENCE.—A HUSBAND OF A LEGATEE AS WITNESS OF THE WILL.	
GILMER <i>v.</i> STONE, (120 U. S. 586)	68
BEQUEST OR DEVISE TO A RELIGIOUS CORPORATION.—LATENT AMBIGUITY.	

TABLE OF CASES REPORTED.

V

	PAGE
GOUDIE <i>v.</i> JOHNSTON, (109 Ind. 427)	351
LIFE ESTATE WITH POWER OF DISPOSITION.	
GOTZIAN, ESTATE OF, (34 Minn. 159)	418
PROVISION FOR A WIDOW.—ELECTION.—CONSTRUCTION OF THE WORDS "ALL MY ESTATE."	
HATCHER <i>v.</i> HATCHER, (80 Va. 169)	439
REPUBLICATION.—EFFECT OF A CODICIL.	
HENDERSON <i>v.</i> HENDERSON, (64 Md. 185)	19
THE RULE IN SHELLEY'S CASE.—TRUST FOR CHILDREN.	
HODGIN <i>v.</i> TOLER, (70 Iowa, 21)	548
A POWER GIVEN TO AN EXECUTOR TO SELL LAND DOES NOT PASS TO AN ADMINISTRATOR CUM TESTAMENTO AN- NEXO.	
HOITT <i>v.</i> HOITT, (63 N. H. 475)	520
REVOCATION OF A WILL.—DECLARATIONS OF THE TESTA- TOR.—EVIDENCE.	
HOPPER, ESTATE OF, (66 Cal. 80)	151
CONSTRUCTION OF A WILL.—INTENTION.	
JOHNSON <i>v.</i> JOHNSON, (106 Ind. 475)	329
ATTESTATION OF A WITNESS.—AT THE SAME TIME OR IN EACH OTHER'S PRESENCE.	
JONES <i>v.</i> JONES, (66 Wis. 310)	306
CONSTRUCTION OF A WILL.—LIFE ESTATE WITH POWER OF DISPOSITION.	
KELLEY <i>v.</i> VIGAS, (112 Ill. 242)	315
CONSTRUCTION OF A WILL.—DEVISE TO A CLASS AS "HEIRS AT LAW."	
KENT <i>v.</i> DUNHAM, (142 Mass. 216)	14
DEVISE TO DESTITUTE KINDRED.—PERPETUITY.—INDEFI- NITE ACCUMULATIONS.—UNCERTAINTY.	
KERNOCHAN, MATTER OF, (104 N. Y. 618)	260
LIFE ESTATES AND REMAINDERS.—STOCK DIVIDENDS AND CASH DIVIDENDS.	

	PAGE
KIDDER, ESTATE OF, (66 Cal. 487)	154
FRAUDULENT DESTRUCTION OF A WILL.—EVIDENCE TO PROVE CONTENTS.	
KIMBRO <i>v.</i> JOHNSTON, (15 Lea, 78)	495
LEGATEES TO TAKE PER CAPITA.	
KONVALINKA <i>v.</i> SCHLEGEL, (104 N. Y. 125) . .	310
DOWER.—ELECTION BETWEEN DOWER AND A PROVISION IN THE WILL.—INTENTION.	
LEWIS'S APPEAL, (108 Penn. St. 133)	466
THE WORDS "SHARE," "PART" AND "PORTION."	
LIKEFIELD <i>vs.</i> LIKEFIELD, (82 Ky. 589)	478
CONSTRUCTION OF A WILL.—CONDITION PRECEDENT.—HOLOGRAPHIC WILL.	
LLOYD <i>v.</i> WAYNE CIRCUIT JUDGE, (56 Mich. 236) .	1
ANTE MORTEM PROBATE.—THE MICHIGAN STATUTE.	
LYON, ESTATE OF, (70 Iowa, 375)	553
WIDOW'S SHARE OF PERSONALTY.	
MCCARTNEY <i>v.</i> OSBURN, (118 Ill. 403)	594
PER CAPITA OR PER STIRPES.—CONSTRUCTION OF A FOREIGN WILL.	
MCKEEGAN <i>v.</i> O'NEILL, (22 S. C. 454)	517
AGREEMENT TO DISPOSE OF PROPERTY BY WILL.	
MILLETT <i>v.</i> FORD, (109 Ind. 159)	384
THE RULE IN SHELLEY'S CASE.	
MILLS <i>v.</i> NEWBERRY, (112 Ill. 123)	318
CONDITION PRECEDENT.—RESIDUARY GIFTS.—PRECATORY WORDS.—CREATION OF A TRUST BY WORDS OF REQUEST.	
MORFORD <i>v.</i> DIEFFENBACKER, (54 Mich. 593) . .	135
CONDITIONAL DEVISE FOR SUPPORT.	

	PAGE
NASH <i>v.</i> SIMPSON, (78 Me. 142)	357
DEVISE TO A WIDOW WHILE SHE REMAINS UNMARRIED.	
NEW YORK, &C., RY. CO., IN RE, (105 N. Y. 89)	502
DEVISE TO ONE ABSOLUTELY WITH REMAINDER OVER.	
ORTLE, ESTATE OF, (84 Minn. 173)	398
LIFE ESTATE IN PERSONALTY.—CHARGE THEREON.	
OSGOOD <i>v.</i> BLISS, (141 Mass. 474)	97
ANTE-NUPTIAL AGREEMENT.—REVOCATION OF THE WILL OF AN UNMARRIED WOMAN BY HER SUBSEQUENT MAR- RIAGE.	
OUTCALT <i>v.</i> OUTCALT, (42 N. J. Eq. 500)	272
CONSTRUCTION OF A RESIDUARY CLAUSE.—GIFT TO ISSUE.	
PAGE, MATTER OF, (118 Ill. 576)	557
PROOF OF THE CONTENTS OF A LOST WILL.	
PATTERSON <i>v.</i> WILSON, (64 Md. 193)	25
THE EXECUTION OF A POWER.	
PEYNADO <i>v.</i> PEYNADO, (82 Ky. 5)	483
CONSTRUCTION OF A WILL.—GIFT TO CHARITABLE USES.— A MUNICIPAL CORPORATION AS TRUSTEE.	
RANDOLPH <i>v.</i> RANDOLPH, (40 N. J. Eq. 73)	406
CONSTRUCTION OF A WILL.—EXECUTORS AS TRUSTEES.	
REBHAN <i>v.</i> MUELLER, (114 Ill. 343)	437
PROBATE OF A WILL.—REVOCATION OF LETTERS OF AD- MINISTRATION.	
ROBINSON <i>v.</i> RANDOLPH, (21 Fla. 629)	447
CONSTRUCTION OF A WILL.—DEVISE IN FEE SIMPLE.— CREATION OF A SEPARATE EQUITABLE ESTATE.	
RUSLING <i>v.</i> RUSLING'S EXECUTORS, (42 N. J. Eq. 594)	251
HUSBAND AS TRUSTEE FOR HIS WIFE.—TESTAMENTARY GIFT IN SATISFACTION OF DEBT.	
RUSSELL <i>v.</i> MINTON, (42 N. J. Eq. 123)	125
PROVISION IN LIEU OF DOWER.—LIMITATION.	

	PAGE
SCHOFIELD v. WALKER , (58 Mich. 96)	211
CONTESTED PROBATE.—UNDUE INFLUENCE.	
SKERRETT, ESTATE OF , (67 Cal. 585)	37
WILL IN THE FORM OF A DEED OF GIFT.—CERTAIN INSTRUMENTS CONSTRUED TO BE A WILL.	
SUNDERLAND v. HOOD , (84 Mo. 293)	433
UNDUE INFLUENCE.—WHEN SUFFICIENT TO INVALIDATE A WILL.	
SWASEY v. JAQUES , (144 Mass. 135)	412
PECUNIARY LEGACIES.—CONSTRUCTION OF A CLAUSE OF THE WILL.	
TAPPAN'S APPEAL , (52 Conn. 412)	193
BEQUEST TO CHARITABLE USES.	
TERRY v. SMITH , (42 N. J. Eq. 504)	277
CONSTRUCTION OF A RESIDUARY CLAUSE.—TRUST FOR THE EXECUTION OF A WILL.	
VANDERZEE v. SLINGERLAND , (108 N. Y. 47)	61
DEVISE OF REAL ESTATE.—A FEE SUBJECT TO A CONDITIONAL LIMITATION.	
VAN GIESAN v. BANTA , (40 N. J. Eq. 14)	426
THE VALIDITY OF THE WILL OF A NON-RESIDENT.	
VERMONT STATE BAPT. CONV. v. LADD , (58 Vt. 95)	205
LEGACY.—INTEREST.—ACCORD AND SATISFACTION.	
VERNOR v. COVILLE , (54 Mich. 281)	184
SALE OF REALTY UNDER A POWER.	
WALTER, WILL OF , (64 Wis. 487)	239
VALID WILL IN A LANGUAGE WHICH THE TESTATOR DOES NOT UNDERSTAND.	
WARNER v. WILLARD , (54 Conn. 470)	293
RESIDUARY BEQUEST.—PRESUMPTION AGAINST INTES- TACY AS TO ANY PART OF THE ESTATE.	

TABLE OF CASES REPORTED.

ix

	PAGE
WEATHERHEAD <i>v.</i> STODDARD, (58 Vt. 623) . . .	284
CONSTRUCTION OF A WILL.—VESTED AND CONTINGENT INTERESTS.	
WEBSTER <i>v.</i> MORRIS, (66 Wis. 366)	158
BEQUEST FOR CHARITABLE PURPOSES.—INDEFINITENESS.—PRECATORY WORDS.—PERPETUITIES.	
WHEELER <i>v.</i> FELLOWES, (52 Conn. 238)	76
BEQUEST OF THE RESIDUUM.—CODICIL.—EXPRESS TRUST.—PERPETUITIES.	
WHITWORTH <i>v.</i> EWING, (15 Lea. 595)	469
WHEN THE LEGATEE IS ENTITLED TO INTEREST.	
WILLIAMS <i>v.</i> NICHOL, (47 Ark. 254)	43
LEX REI SITUS.—LEGACY CHARGED UPON LANDS.—TRUSTEES.	
WORTHINGTON <i>v.</i> KLEMM, (144 Mass. 167)	415
EVIDENCE AS TO THE KNOWLEDGE OF THE TESTATOR.—CONTENTS OF THE WILL.	
YARDLEY <i>v.</i> OUTHBERTSON, (108 Penn. St. 395)	562
UNDUE INFLUENCE.—DEVISAVIT VEL NON.—EVIDENCE.—EXPERT TESTIMONY.	
<hr/>	
INDEX,	607

TABLE OF CASES CITED.

-
- | | |
|---|--|
| <p> Abbott v. Bradstreet, 95, 96
 Abbott v. Middleton, 180, 445.
 Abbott v. Peters, 392
 Abercrombie v. Riddle, 270
 Abney v. Miller, 495
 Academy v. Clemens, 305
 Ackerman v. Emott, 261
 Ackerman v. Gorton, 400
 Adams v. Adams, 236, 274, 276, 282
 Adams v. Bass, 305
 Adamson v. Ayres, 423
 Adsit v. Adsit, 311, 312, 313
 Adye v. Smith, 336
 Agar v. Fairfax, 361
 Aiken v. Stewart, 274
 Aird v. Quick, 283
 Alchin Trustees, 305
 Alden v. Johnson, 544
 Alfonso's Appeal, 430
 Alfred v. Marks, 81, 122, 128
 Alger v. Alger, 428
 Allan v. Allan, 7
 Allen v. Craft, 353
 Allen v. Hall, 361
 Allen v. Harrison, 493
 Allen v. Jackson, 360
 Allen v. Manning, 392
 Allen v. Pray, 129
 Allen v. Jackson, 171
 Allen's Ex'rs v. Allen, 71
 Alleyne v. Alleyne, 127
 Allsup v. Allsup, 428
 Alvord v. Lent, 280
 American Bible Soc. v. Wetmore, 303
 Amory v. Lawrence, 364
 Anderson v. Jackson, 506
 Andrews v. Bank of Cape Ann, 280
 Andrews v. Spurlin, 368
 Applegate v. Smith, 432, 493
 Armistead v. Dangerfield, 411
 Armorer v. Case, 281
 Armstrong v. Lear, 427
 Arnald v. Arnald, 547
 Arnett v. Arnett, 395, 398 </p> | <p> Arnold <i>et al.</i> v. Arnold <i>et al.</i>, 42
 Arthur v. Arthur, 281
 Ash v. Ash, 92, 544
 Ashurst v. Field's Adm'r, 272
 Aston v. Wood, 305
 Atchison v. Lindsay, 481
 Atkins v. Albree, 261, 262, 271
 Atkins v. Hiccocks, 293
 Attorney-General v. Boucherrett, 303
 Attorney-General v. Brentwood
 School, 303
 Attorney-General v. Brereton, 303
 Attorney-General v. Bucknell, 16
 Attorney-General v. Clack, 54
 Attorney-General v. Combe, 340
 Attorney-General v. Comber, 304
 Attorney-General v. Earl of Clarendon, 303
 Attorney v. Garrison, 305
 Attorney-General v. Haberdasher's
 Co., 304
 Attorney-General v. Hickmen, 303
 Attorney-General v. Hotham, 304
 Attorney-General v. Jackson, 303
 Attorney-General v. Lloyd, 281
 Attorney-General v. Mayor of Coventry, 303
 Attorney-General v. Mayor of Dublin, 303
 Attorney-General v. Middleton, 303
 Attorney-General v. Northumberland,
 17, 177
 Attorney-General v. Price, 16, 177
 Attorney-General v. South Sea Com-
 pany, 303
 Attorney-General v. Stepney, 305
 Attorney-General v. Wallace's Devi-
 sees, 488
 Attorney-General v. Webster, 304
 Attorney-General v. Whitchurch, 304
 Averill v. Taylor, 429
 Ayer v. Ayer, 360
 Babineau v. Le Blanc, 395 </p> |
|---|--|

- Bacon v. Bacon, 289
 Baggett v. Meux, 461
 Bailey v. Sauger, 353, 368
 Bailis v. Gale, 458
 Baker v. Clark, 304
 Baker v. Copenbarger, 188
 Baker v. Dodson, 396
 Balch v. Hallet, 271
 Balliet's Appeal, 534-547
 Bane v. Wick, 129
 Banner v. Lowe, 297
 Baptist Association v. Hart's Ex'rs,
 303, 340
 Barber v. Hite, 129
 Barclay v. Maskelyne, 282
 Barclay v. Wainewright, 260, 270, 271
 Barker v. Comins, 283
 Barker v. Pearce, 411
 Barker v. Wood, 340
 Barnum v. Mayor of Baltimore, 173
 Barrington v. Tristram, 477
 Barry v. Brown, 381
 Barry v. Butlin, 579
 Barry v. Edgeworth, 458
 Bartholomew v. Henry, 42
 Bartlett v. King, 305
 Bartlett v. Nye, 308
 Barton's Trust, 267, 271
 Bash v. Bash, 340
 Basket v. Hassell, 346
 Bass v. Bass, 41
 Bassett v. Granger, 317
 Bate v. Amherst, 411
 Bates v. Hillman, 310
 Bates v. McDowell, 129
 Bates v. McKinley, 260, 270, 271
 Bathgate, *In re*, 392
 Battle v. Speight, 493
 Baxter v. Bowyer, 355
 Bayard v. Conover, 593
 Beale v. Beale, 411
 Beardsley v. Selectmen, 177, 178
 Beasley v. Jenkins, 497
 Beatty v. Beatty, 392
 Beatty v. Kurtz, 308
 Beatty's Adm'r v. Montgomery's
 Ex'r, 250
 Beaufort v. Colyer, 461
 Beckham v. Wittkowski, 432
 Beckwith v. Sydebotham, 571
 Bedon v. Bedon, 411
 Beekman v. Beekman, 591
 Beekman v. Bonsor, 305, 340
 Beeler v. Dunn, 433
 Begg v. Anderson, 166
 Begg v. Begg, 165
 Belote v. White, 501
 Bender v. Fleurie, 374
 Bending v. Bending, 311, 313
 Benedict v. Webb, 336
 Bennett v. Jackson, 395, 398
 Berkeley v. Palling, 238
 Bernard v. Minshull, 230
 Berney v. Drexel, 432
 Besancon v. Brownson, 148
 Betts v. Betts, 261, 305
 Biddle v. Biddle, 395, 398
 Biddle's Appeal, 272
 Biggs v. McCarty, 368
 Billingham v. Vickers, 417, 580
 Birchard v. Scott, 178
 Bitner v. Bitner, 566
 Blaicklock v. Grindle, 543
 Blake v. Bunberry, 50
 Blakiston v. Hazlewood, 412
 Blanchard v. Blanchard, 95, 96, 402
 Bland v. Bland, 325
 Blandin v. Blandin, 534, 547
 Blaney v. Blaney, 492, 493
 Blatchford v. Newberry, 321
 Bliss v. American Bible Society, 308
 Blodgett v. Moore, 543
 Bloomer v. Bloomer, 544
 Blosson v. Blosson, 412
 Blower v. Morrett, 380
 Blume v. Hartmann, 417, 592
 Blundell v. Dunn, 495
 Boardman v. L. S. & M. S. R. Co.,
 261
 Board of Education v. Edson, 305
 Board of Education v. Ladd, 493
 Bogert v. Hertell, 189, 310
 Bold v. Hutchinson, 526
 Bonafaut v. Greenfield, 190, 191
 Bond v. Graham, 427
 Boofter v. Rogers, 41, 43, 392
 Booth v. Booth, 295
 Booth v. Ammerman, 132
 Borland v. Nichols, 129
 Boskin's Appeal, 317
 Bostick v. Blades, 171
 Botsford v. Kranke, 393
 Boughton v. Flint, 189, 256, 258
 Boutelle *et al.* v. Cowdin, 340
 Bowditch v. Andrews, 96
 Bowen v. Johnson, 547
 Bowers v. Bowers, 542
 Bowker v. Pierce, 271
 Bowling v. Scales, 474
 Box v. Barrett, 281

- Boyd v. Boyd, 574-578
 Boyes v. Cook, 100
 Boyse v. Rosborough, 486
 Brackenbury v. Brackenbury, 283
 Bradford Academy v. Grover, 306
 Bradford's Adm'r v. Bradford, 482
 Bradish v. Gibbs, 28, 100
 Bradstreet v. Kinsella, 482
 Brady v. Cubit, 87, 91, 541, 544
 Braggs v. Dyer, 392, 394
 Brake, *In re*, 166
 Brander v. Brander, 260, 271
 Brandow v. Brandow, 403
 Brant v. Virginia Coal, &c. Co., 355
 Brattle Square Church v. Grant, 15
 Braxton v. Freeman, 129
 Breckenridge v. Duncan, 71
 Breese v. Stiles, 90
 Brest v. Offley, 230
 Brewster v. McCall, 71
 Brewton v. Brewton, 555
 Bridges v. Pleasants, 176
 Briggs v. Shaw, 457
 Briggs v. Perry, 304
 Brimmer v. Sophier, 153, 493, 494
 Bringham v. Winchester, 493
 Brink v. Layton, 310
 Brinley v. Grou, 261, 262
 Bristead v. Weeks, 591, 592
 Bristol v. Atwater, 123
 Bristol v. Warner, 42
 Bristow v. Bristow, 477
 Britton v. Thornton, 63, 506
 Broach v. Sing, 395
 Bromley v. Miller, 430
 Broughton v. Broughton, 349
 Brown v. Armistead, 552
 Brown v. Brown, 395, 396, 427, 428
 Brown v. Clark, 543
 Brown v. Harmon, 388
 Brown v. Higgs, 324
 Brown v. Hobson, 551
 Brown v. Kelsey, 303
 Brown v. Knapp, 49, 428
 Brown v. Shand, 392
 Brown v. Thompson, 540, 541
 Browne v. Thorndike, 547
 Brown v. Tilden, 391
 Brown v. Williams, 123
 Brown, *Ex parte*, 589
 Brown, *In re*, 261
 Brown, Petition of, 271
 Browne v. Collins, 270
 Brownfield v. Brownfield, 166
 Brownlee v. Lockwood, 428
 Brundage v. Brundage, 261
 Brunsden v. Woolredge, 177
 Brush v. Brush, 534
 Brush v. Wilkins, 86, 90, 91, 92, 534, 539, 542
 Brush v. Young, 279
 Bryan v. Wash, 343, 349
 Brydges v. Duchess of Chandos, 534
 Budd v. Brooke, 430
 Buel v. Southwick, 66
 Bullard v. Benson, 129
 Bullock v. Bullock, 283
 Bull v. Church, 311
 Bull v. Pritchard, 600, 602
 Bunnell v. Bunnell, 283
 Bunn v. Winthrop, 343, 349
 Burbank v. Whitney, 305
 Burdet v. Hopgood, 411
 Burford v. Burford, 282
 Burger v. Hill, 283
 Burgoine v. Fox, 538
 Burke v. Chamberlain, 454
 Burke v. Wilder, 411
 Burleigh v. Clough, 360, 400, 401, 405
 Burleson v. Burleson, 363
 Burroughs v. Philcox, 304, 324
 Burrows v. Sherne, 600
 Burr v. Smith, 303
 Burr's Ex'rs v. Smith, 176, 340
 Burton v. Collingwood, 481
 Busbee v. Freeman, 271
 Butler v. Butler, 601
 Butler v. Ommancy, 600
 Butlin v. Barry, 579
 Byars v. Spencer, 345
 Byles v. Glenn, 357
 Byrd v. Surles, 541
 Byrne, Estate of, 592
 Byrne v. Frere, 129
 Caborne v. Godfrey, 519, 526, 527
 Cadywold, *In re*, 541
 Cafe v. Bent, 54
 Caldwell v. Ferguson, 454
 Caldwell v. Maxwell, 428
 Campbell v. Beaumont, 308
 Campbell v. French, 282
 Campbell v. Logan, 41
 Campbell v. Sheldon, 427
 Campbell v. Tousey, 428
 Campbell v. Wallace, 429
 Canfield v. Bostwick, 442, 491, 495
 Carder v. County, 128
 Carey v. Dennis, 42
 Carmen's Estate, 129

- Carpenter v. Denson, 482
 Carpenter, Executor of, v. Moore, 202, 208
 Carroll v. Burns, 371
 Carroll v. Thomas, 584, 589
 Carr v. Living, 280
 Carter v. Balfour, 305
 Carter v. Dixon, 593
 Carter v. Thomas, 584, 589
 Cartwright v. Pultney, 362, 363
 Castle v. Torre, 392
 Chaffers v. Hill, 599
 Chalmers v. Stovil, 310
 Chamberlain v. Chamberlain, 129, 304, 512, 513, 514
 Chamberlain v. Owings, 454, 456, 458
 Chambers v. Baptist Education Society, 488
 Chambers v. St. Louis, 304, 305
 Chancey's Case, 258
 Chapman's Will, 275
 Chase v. Chase, 280, 516
 Chaworth v. Beech, 42
 Chrisman v. Gregory, 432
 Christian Union v. Yount, 72
 Christopher v. Christopher, 86, 90, 538, 540
 Christopherson v. Naylor, 276
 Church v. Bull, 311, 312
 Church v. Croker, 543
 Church v. Holcomb, 148
 Churchill v. Lady Speake, 289, 290
 Clapp v. Astor, 260, 266
 Clapp v. Fullerton, 304
 Clark v. Jaques, 461
 Clark v. Middlesworth, 403
 Clark v. Smith, 587
 Clarke v. Blake, 410
 Clarke v. Leupp, 369
 Clarke v. Ransom, 41
 Clarke's Estate, 498
 Clarkson v. Clarkson, 260
 Clavering v. Clavering, 349
 Clay v. Hart, 130
 Clay v. Pennington, 237
 Clayton v. Gresham, 271
 Clayton v. Lowe, 65, 505
 Cleare v. Cleare, 416, 417
 Cleveland v. Burnham, 166
 Cleveland v. Carson, 284
 Clifford v. Farmer, 388
 Clinefelter v. Ayers, 191
 Clingan v. Mitchelltree, 547
 Clive v. Clive, 260, 270
 Clopten v. Booker, 49, 51
 Clough v. Clough, 542
 Coates v. Hughes, 544
 Coates v. Stevens, 129
 Coburn v. Harvey, 175
 Cogdell v. Cogdell, 493
 Cogswell v. Cogswell, 59, 260, 263, 270
 Coit v. Comstock, 197, 336
 Colbert v. Daniel, 428
 Colby v. Duncan, 125
 Cole v. Champlain Transportation Co., 210
 Cole v. Cole, 310
 Cole v. Wade, 284
 Coley's Estate, 430
 College v. Coddington, 495
 Colleton v. Garth, 129
 Collier v. Slaughter, 600
 Collins v. Carman, 129
 Collins v. Collins, 368
 Comb's Appeal, 417
 Commonwealth v. Allegheny Co., 305
 Commonwealth v. Bonsall, 303
 Commonwealth v. Rogers, 571
 Conklin v. Egerton's Adm'r, 191, 550, 551
 Connover v. Connover, 593
 Connecticut v. Jackson, 261
 Cook v. Ellington, 230
 Cook v. Holmes, 457
 Cook v. Platt, 310, 312
 Cooke v. Platt, 511
 Cooke v. Turner, 172
 Cooper v. Cooper, 410
 Cooper v. Forbes, 411
 Corby, *In re*, 395
 Corliss, *In re*, 411
 Corporation of Ludlow v. Greenhouse, 303
 Corr v. Porter, 442, 446
 Corriel v. Ham, 129
 Cort v. Winder, 275
 Coster v. Lorillard, 340
 Cotter v. Laver, 538, 542
 Cotton v. King, 349
 Covenhoven v. Shuler, 357
 Coverdale v. Eastwood, 527
 Cox v. Bennett, 548
 Cox v. Rogers, 130
 Coyle v. The Commonwealth, 573
 Craig v. Howe, 230
 Craig v. Secrist, 170, 182
 Cravens v. Falconer, 331
 Crawford v. Bertholf, 350

- Crawford v. Thompson, 172
 Crenshaw v. Creek, 129
 Cresson's Appeal, 498
 Crisfield v. Stow, 411
 Critz v. Pearce, 591
 Croly v. Weld, 379
 Cronin v. Hazeltine, 189
 Crook v. Hill, 410
 Crosby v. Close, 495
 Cross v. Cross, 42
 Crossman v. Field, 454
 Crostnaght v. Hutchinson, 129
 Crothwaite v. Dean, 281
 Cruikshank v. Home for the Friend-
 less, 305
 Cruse v. McKee, 502
 Cruwys v. Colman, 325, 327
 Cuming v. Boswell, 270
 Cunningham v. Shannon, 128
 Curling v. Curling, 305, 486, 487
 Curtis v. Hutton, 304
 Curtis v. Smith, 433
 Cushing v. Aylwirl, 492, 494
 Cuthbert v. Peumer, 329
 Cuthbertson's Appeal, 574, 583

 Daland v. Williams, 261, 262, 271
 Dale v. Dale, 598
 Dameron v. Jameson, 368
 Dan v. Brown, 537, 559
 Daniell v. Daniell, 411
 Danvers v. Manning, 288
 Darling v. Blanchard, 96
 Dashiell *et al.* v. Attorney-General,
 340
 Davenport v. Hassel, 415
 Davidson v. Boomer, 128
 Davis v. Morris, 429
 Davis v. Sigourney, 157
 Davis' Estate, 544
 Dawes v. Boylston, 428
 Dawson v. Bell, 311
 Day v. Day, 416, 417
 Dean v. Dean, 540
 Dean v. Negley, 435, 436, 487, 578,
 590
 De Camp v. Dobbins, 179, 180
 De Gendre v. Kent, 270
 Delafield v. Parish, 436, 540
 Delany v. Delany, 173
 Demoss v. Demoss, 129
 Den v. Emana, 369, 370
 Den v. Payne, 459
 Denn v. Cornell, 282
 Denny v. Kettell, 95, 96

 Denton v. Franklin, 436
 Dent v. Allcroft, 304
 Denyer v. Druse, 340
 De Peyster v. Clendining, 357, 405
 De Peyster v. Michael, 372
 Derby v. Derby, 176, 178
 Detweiler v. Groff, 568
 Deupree v. Deupree, 541
 Devecmon v. Devecmon, 391
 Dewey v. Dewey, 381
 De Wolf v. Lawson, 168
 Dexter v. Hall, 568
 Dickey v. Malechi, 559
 Dickinson v. Hoomes, 428
 Dickson v. Robinson, 310
 Dickson v. Satterfield, 23
 Dickson's Trust, 172
 Dike v. Ricks, 191
 Dildine v. Dildine, 129
 Dillard v. Harris, 428
 Dilworth v. Rice, 552
 Dimes v. Scott, 473
 Dingley v. Dingley, 96
 Ditch v. Sennett, 130
 Dixon's Appeal, 539
 Dobson, *In re*, 482
 Dockum v. Robinson, 392, 395
 Dodd v. Winship, 271
 Dodge v. Dodge, 310, 424, 425
 Dodge v. Pond, 310
 Dodge v. Manning, 49
 Dodge v. Williams, 168, 175, 181,
 183, 340
 Doe v. Barford, 91, 535
 Doe v. Eldlin, 532
 Doe v. Gallini, 369
 Doe v. Jackman, 368, 372, 387, 388
 Doe v. Knight, 350
 Doe v. Lancashire, 540, 544
 Doe v. Morgan, 453
 Doe v. Palmer, 537, 560
 Doe v. Roberts, 453
 Doe v. Sparrow, 65, 505
 Doe v. Staple, 538, 542
 Doe v. Webber, 506
 Doe dem. Caldecott v. Johnson, 28
 Doe dem. Lancashire v. Lancashire,
 88, 90
 Doe dem. Smith v. Bird, 27
 Doe, Lessee of the Earl of Lindsey v.
 Colyear, 23
 Doebler's Appeal, 373
 Doggett v. Stock, 316
 Doker v. Goff, 392
 Dole v. Johnson, 359

- Dominick v. Michael, 189
 Donegan v. Taylor, 432
 Donohoo v. Lea, 547
 Donovan v. Van Demark, 511, 512
 Doolittle v. Lewis, 429
 Doran v. Mullen, 559
 Dorley v. Attorney-General, 304
 Dorsey v. Sheppard, 396, 398
 Dotts v. Fetzer, 564
 Dougherty v. Dougherty, 480
 Douglas v. Blackford, 22
 Douglas v. Cooper, 542
 Downie v. Buennagel, 386
 Downing v. Marshall, 511
 Drake's Appeal, 580
 Drummond v. Parish, 393
 Dublin Case, 305
 Duffel v. Burton, 548
 Dummer v. Pitcher, 129
 Du Mourmelin v. Sheldon, 542
 Dunham v. Averill, 281
 Dupree v. Cary, 129
 Durham v. Simmons, 129
 Durling v. Loveland, 579
 Duryea v. Duryea, 542
 Dyke v. Dyke, 283
- Eager v. Roberts, 261
 Earle v. Wilson, 412
 Earl of Belfast v. Chichester, 7
 Earl of Ichester, *Ex parte*, 91
 Early v. Middleton, 411
 Earp's Appeal, 261, 272
 Earp's Will, 297
 Eatherly v. Eatherly, 284
 Eccles v. Berkett, 602
 Eckert v. Flowery, 434, 435
 Edge v. Salisbury, 177
 Edmunds v. Low, 259
 Edmunds v. Waugh, 282
 Edwards v. Edwards, 64, 506
 Edwards v. Grove, 502
 Edwards v. Jagers, 308
 Edwards v. Warwick, 297
 Eells v. Holder, 429
 Egerton's Adm'r v. Conklin, 552
 Ehrenberg, Succession of, 41
 Ela v. Edwards, 100
 Elizabeth Baid, Case of, 51.
 Ellington v. Dillard, 392, 395
 Ellis v. Lewis, 311, 314
 Ellis v. Proprietors, &c., 271
 Ellis v. Smith, 330
 Elsdon v. Elsdon, 392
 Eltzroth v. Binford, 355
- Embury v. Sheldon, 65
 Emerson v. Boville, 540
 Emerson v. Cutler, 96
 Emery's Estate, 411
 Emery v. Batchelder, 431
 Emmons v. Cairns, 507
 Epps v. Dean, 547
 Esterbrook v. Gardner, 593
 Euston v. Seymour, 394
 Evans v. Anderson, 92
 Evans v. Englehart, 477
 Evans v. Evans, 281
 Evans v. Jones, 598
 Evans v. Smith, 48
 Everett v. Carr, 380
 Everitt v. Everitt, 108
 Evine's Appeal, 303
 Ewen v. Bannerman, 304
 Ewen v. Perrine, 591, 594
 Exchange Bank v. Stone, 129
 Eyre v. Eyre, 540
 Eyre v. Shaftesbury, 308
- Fabens v. Fabens, 413
 Fairchild v. Bascomb, 573
 Fairfax *et al.* v. Brown, 24
 Fairfield v. Lawson, 176, 336
 Fallon v. Chidester, 92, 544
 Farmer's Bank v. Moran, 404
 Farnsworth v. Cole, 130.
 Farrar v. Winterton, 547
 Farrer v. Ayres, 283
 Farthshore v. Chalie, 129
 Fears v. Brooks, 461, 462, 463
 Feit's Exrs. v. Vanatta, 250
 Fellows v. Allen, 530, 533, 534, 539,
 540, 543
 Fellows v. Miner, 340
 Fenwick v. Bell, 571
 Ferry v. Wiggins, 309
 Festing v. Allen, 600
 Field v. Eaton, 130
 Field v. Gibson, 431
 Findley v. Findley, 129
 Finley v. King, 199
 Fitzhugh v. Foote, 129
 Flinn v. Owen, 331
 Florey v. Florey, 284
 Floyd v. Floyd, 534
 Fluke v. Fluke, 493
 Fogg v. Clark, 454, 457
 Foley v. Burnell, 356
 Fountain v. Ravenel, 176
 Foos v. Scarpetal, 29
 Forbes v. Caruthers, 568

- Forse & Hembling's Case**, 542
Forsight v. Grant, 127, 128
Foster v. Cook, 311, 314
Fountain Co. &c. Co. v. Beckleheimer, 368
Fox v. Fox, 291
Fox v. Marston, 91, 544
Fransen's Will, 543
Frazer, In re, 311, 313, 314
Freemantle v. Freemantle, 412
Freeman v. Coit, 369
Freeman v. Flood, 461
Freeman v. Spaulding, 315
French v. Davidson, 289
Frew v. Clarke, 574
Frey v. Frey, 477
Frierson v. Beall, 392
Fuller v. Yates, 311, 312, 314
Furley v. Hydes, 270
- Gable v. Daub**, 493
Gaines v. Briggs, 130
Gaines v. Com., 574
Gardiner's Estate, 411
Gardner v. Gardner, 404
Garner v. Lansford, 395
Garnors v. Knight, 344
Garrett v. Dabney, 538
Garrison v. Garrison, 493
Gary v. Exrs. of James, 519, 526, 527
Gaskins v. Gaskins, 391
Gay v. Gay, 537
Gay v. Parpart, 363, 364
Gaylor's Appeal, 331
Gee v. Mayor of Manchester, 65, 504, 505
Gerard, In re, 261, 262
Getchell v. Hill, 571
Gibbens v. Cross, 544
Gibbon v. Gibbon, 129, 493
Gibbons v. Caunt, 540, 544, 545
Gibbons v. Mahon, 271
Gibson v. Bath, 132
Gibson v. Bott, 478
Gibson v. Dooley, 436
Gibson v. Gibson, 311, 313, 396, 398, 411
Gibson v. McCall, 340
Gifford v. Dyer, 282
Gifford v. Thompson, 261, 271
Gilbert v. Bennett, 230
Giles v. Giles, 238
Giles v. Little, 354, 355
Gillam v. Taylor, 17
- Gillespie v. Brooks**, 261
Gillespie v. Schuman, 411
Gillman v. Hamilton, 305
Gillow v. Bourne, 392
Gill v. Burley, 271
Gill's Will, 396
Gilman v. Town of Strafford, 570
Gimblett v. Purton, 597
Glen v. Fisher, 50
Godfrey v. Davis, 411
Godfrey v. Humphrey, 458
Goilmore v. Battison, 526
Going v. Emery, 176, 183
Golder v. Littlejohn, 309
Golding v. Golding, 41
Gold v. Judson, 491, 495
Goldsmith v. Swift, 260, 261, 271
Gonzales v. Barton, 373, 387
Goodale v. Mooney, 178
Goode v. McPherson, 305
Goodfellow v. Goodfellow, 411
Goodman v. Goodman, 392
Goodtitle on the Demise of Sweet v. Hening, 23
Goodtitle v. Meredith, 446
Goodtitle v. Otway, 544
Goodwin v. Goodwin, 156
Gordon v. Stevens, 129
Gordon v. Hoffman, 282
Gould v. Safford, 393
Gould v. Taylor Orphan Asylum, 181
Goulder v. Camm, 461
Gore v. Stevens, 130
Gotzian's Estate, 129
Gowling v. Thompson, 239
Graham v. Livingston, 310
Granger v. Bassett, 261
Gravely v. Gravely, 428
Graves v. Sheldon, 534, 540
Gray v. McCune, 129
Gray v. Portland Bank, 261
Gray v. Ryle, 432
Green v. Hewitt, 354, 355, 402, 403
Green v. Osborn, 297
Greene v. Dennis, 334
Greenwood v. Cline, 593
Gregory v. Cowgill, 355
Grey v. Pearsol, 444
Gridley v. Gridley, 49
Griffith v. Canning, 130
Grimke v. Exrs. of Grimke, 519
Grines v. Harmon, 303, 305
Groce v. Rittenberry, 410
Groton v. Ruggles, 303

Groves *v.* Wright, 408
 Gulliver *v.* Wicket, 411
 Guthrie *v.* Owen, 391
 Gunn, *In re*, 188
 Gwin *v.* Wright, 395, 398

Habergham *v.* Vincent, 41, 344
 Hackett *v.* Stephens, 544
 Hadlock *v.* Gray, 869
 Hagan *v.* Tate, 593
 Hagenmeyer's Will, 304
 Hale *v.* Hale, 410
 Hales *v.* Morgerum, 28
 Hall *v.* Bray, 547
 Hall *v.* Goodwin, 451
 Hall *v.* Hall, 124, 128, 129
 Hall *v.* Hancock, 411
 Hall *v.* Hill, 544
 Hall *v.* Irwin, 551
 Halstead *v.* Meeker, 477
 Halton *v.* Foster, 413
 Hammersley *v.* Baron de Biel, 526
 Hammond *v.* Hammond, 24
 Hampton Elliott, Succession of, 41
 Handy *v.* Collins, 478
 Hand *v.* Marcey, 129
 Hanson *v.* Willard, 361
 Haraden *v.* Larrabee, 413
 Harcourt *v.* Morgan, 477
 Harding *v.* Glyn, 230, 304
 Hardy *v.* Scales, 128
 Hargroves *v.* Redd, 537
 Harmer *v.* Moulton, 283
 Harper *v.* Archer, 411
 Harrington *v.* Stees, 395, 396
 Harris *v.* Bedford, 392
 Harris *v.* Clark, 340
 Harris *v.* Du Pasquier, 304
 Harris *v.* Fly, 49, 67
 Harris *v.* Knapp, 353
 Harris *v.* Newton, 413
 Harrison *v.* Grimwood, 291
 Harrison *v.* Harrison, 311
 Harrison *v.* Haskins, 282
 Harrison's Appeal, 578
 Hartop *v.* Whitmore, 556
 Hart *v.* Hart, 544
 Harvard College *v.* Amory, 271, 383
 Harvey *v.* Chouteau, 446
 Harwood *v.* Root, 462
 Hassenritter *v.* Hassenritter, 130
 Hastilow *v.* Stobie, 416, 417
 Hatch *v.* Bassett, 310
 Haus *v.* Palmer, 395
 Havens *v.* Havens, 128, 311, 312

Havens *v.* Van Den Burgh, 92, 542
 Hawes *v.* Humphrey, 534
 Hawkins *v.* Garland's Admr., 166
 Hawley *v.* James, 81, 82, 310, 513
 Hawley *v.* Northampton, 459
 Haxtun *v.* Corse, 513
 Hay *v.* Palmer, 297
 Hayden *v.* Inhabitants of Stoughton,
 109
 Haydock *v.* Haydock, 590
 Hayes, *In re*, 393
 Hayes *v.* Frey, 429
 Hayes *v.* Hayes, 282
 Haynie *v.* Dickens, 129
 Hayter *v.* Trego, 340
 Heald *v.* Thing, 573
 Heard *v.* Eldridge, 261, 271
 Hearn *v.* Ross, 284
 Heath *v.* Wittington, 100, 103
 Hebden's Will, 390, 392
 Hedenburg *v.* Hedenburgh, 430
 Heise *v.* Heise, 539
 Heiss *v.* Murphy, 170, 175, 305
 Helm *v.* Frisbie, 387
 Helyar *v.* Helyar, 540
 Hemenway *v.* Hemenway, 271
 Henderson *v.* Blackburn, 149, 355,
 403
 Henderson *v.* Ryan, 493
 Henney *v.* Patterson, 96
 Henry, *Ex parte*, 391, 392
 Herald *v.* Harper, 189
 Herbert *v.* Berrier, 591, 332
 Herbert *v.* Post, 250
 Herne, *In re*, 392
 Herring *v.* Barrow, 860, 402
 Hesketh *v.* Murphy, 170, 177, 178
 Heuser *v.* Harris, 324
 Hewitt, *In the Matter of Probate of*
 Will of, 382
 Hibbard *v.* Hurlburt, 296
 Hibbs *v.* Insurance Co., 130
 Hickey *v.* Hickey, 422
 Hickman *v.* Dudley, 433
 Higginbotham *v.* Cornwell, 129
 Higgins *v.* Diven, 295.
 Hileman *v.* Bouslaugh, 375, 376,
 388
 Hill *v.* Bacon, 493
 Hill *v.* Chapman, 600
 Hill *v.* Newchawanick Co., 261, 262,
 263
 Hinckley, Estate of, 304, 305, 341
 Hinckley *v.* Thatcher, 71
 Hinds *v.* Hinds, 386

- Hixon v. Oliver, 599
 Hoak v. Hoak, 283
 Hobbes v. Knight, 540
 Hoby v. Hoby, 391
 Hochstedler v. Hochstedler, 353, 368, 369
 Hodgson v. Halford, 172
 Hodsden v. Lloyd, 102, 542
 Hodsden v. Staple, 101
 Hoey v. Kenny, 304
 Hoffman v. Hoffman, 381
 Hogan v. Curtin, 171
 Hogan v. Grosvenor, 331
 Holden v. Howell, 34
 Holland v. Peck, 305
 Hollis v. Drew Theological Seminary *et al.*, 340
 Holloway v. Clarke, 545
 Holman v. Perry, 100, 103
 Holmes v. Mead, 304, 340
 Home v. Pillans, 506
 Hone's Exrs. v. Von Schaick, 289
 Hone v. Van Schaick, 411
 Honeywood v. Forster, 422
 Hood v. Mathus, 430
 Hooe v. Hooe, 440
 Hooper v. Rossiter, McClelland, 271
 Hope's Appeal, 560
 Hopkin's Trusts, *In re*, 261, 267, 271
 Hopkins v. Quinn, 355
 Horah v. Knox, 591
 Horne v. Lyeth, 23
 Hornsey v. Casey, 129
 Hosea v. Jacobs, 493
 Houghten v. Kendall, 413, 414
 Howard v. Am. P. Soc., 166, 170, 176
 Howard v. Carusi, 326
 Howard v. Francis, 478
 Howell v. Hanforth, 297
 Howell v. Green, 250
 Howey v. Goings, 362, 363
 Hoyradt v. Kingman, 331
 Hubbard v. Hubbard, 394
 Hughes v. Hughes, 436, 544, 590
 Huguenin v. Basely, 581
 Hunt v. Hunt, 42
 Hunt v. Lowell Gas Light Co., 572
 Hunt v. White, 284, 392
 Huntington v. Huntington, 392
 Hull v. Culver, 149, 355
 Hulme v. Heyagte, 446
 Huse v. Brown, 395
 Hyatt v. Allen, 260, 261, 263, 264, 268
 Hyde v. Seymour, 411
 Hyer v. Shobe, 493
 Ilchester, *Ex parte*, 541
 Illinois Land & Loan Co. v. Bonner, 600
 Ingersoll's Appeal, 373
 Ingle v. Jones, 551
 Inglis v. Sallor's Snug Harbor, 340
 Ingram v. Smith, 497
 Ingram v. Wyatt, 579
 Irving v. Houstoun, 271
 Irwin v. Zane, 295
 Isaac v. De Friez, 17, 177
 Isaac v. Gumperz, 305
 Isham v. Gibbons, 432
 Irsell v. Rodon, 540, 541, 544
 Ives v. Allen, 430
 Izard v. Middleton, 519
 Jackson v. Bull, 50
 Jackson v. Churchill, 311
 Jackson v. Housel, 459
 Jackson v. Howard, 454
 Jackson v. Kniffen, 537
 Jackson v. Legrange, 559
 Jackson v. Payne, 283
 Jackson v. Phillips, 15, 305
 Jackson v. Robins, 402
 Jackson v. Schaubert, 513
 Jackson v. Vickery, 559
 Jackson d. Cooper *et al.* v. Cory, 340
 Jacomb v. Harwood, 189
 James v. Allen, 304
 James v. James, 334
 James v. Pruden, 492, 494, 495
 James, *In re*, 281
 Jarvis v. Pond, 239
 Jauncey v. Thorne, 330, 559
 Jenkins v. Freyer, 600
 Jenkins v. Clement, 451
 Jenkins v. Lester, 431
 Jennings v. Smith, 129
 Jennison v. Smith, 429
 Jermain v. Lake Shore, &c. R. R. Co. 271
 Jessen v. Wright, 369
 John v. Bradbury, 355
 Johns v. Hodges, 493
 Johnson v. Battelle, 402
 Johnson v. Bridgewater Mfg. Co., 271
 Johnson v. Goss, 129
 Johnson v. Johnson, 91, 129, 260, 271
 Johnson v. Smith, 349

- Johnson's Appeal, 51
 Johnson's Will, Matter of, 158
 Johnson v. Glasscock, 395
 Johnston v. Johnston, 535, 536
 Johnston v. Wells, 541
 Jolliffe v. East, 36
 Jones v. Habersham, 284, 341
 Jones v. Hartley, 547
 Jones v. Jones, 129, 228, 350
 Jones v. Kea, 392
 Jones v. Lake, 330
 Jones v. Lloyd, 128
 Jones v. Miller, 388
 Jones v. Norton, 395
 Jones v. Ogle, 271
 Jones v. Shewmaker, 493
 Jones v. Simmons, 405
 Jones v. Stites, 408
 Jones v. T. H. &c. R. R. Co., 260
 Jordan v. Fortescue, 283
 Judson v. Gibbons, 191

 Kain v. Gibboney, 340
 Keay v. Boulton, 414
 Kelly v. Kelly, 63, 395
 Kelly v. Reynolds, 423
 Kendall v. Granger, 178, 182, 304
 Kendall v. Kendall, 129
 Kenebel v. Scrafton, 83, 91, 541, 544
 Kennell v. Abbott, 284
 Kempsey v. McGuinis, 573
 Kempton's Case, 129
 Kent v. Dunham, 477
 Kerrigan v. Leonard, 591
 Kerr v. Dougherty, 340
 Kerr v. Moon, 432
 Kessinger v. Kessinger, 436
 Ketchum v. Stearns, 590
 Ketchum v. Walsworth, 129
 Key v. Key, 444
 Kimball, &c. Co. v. Vrohman, 146
 Kingsbury v. Burnside, 350
 King v. Ackerman, 465
 King v. Woodhull, 340
 King's Proctor v. Daines, 394
 Kinnaird v. Williams, 130
 Kinnard v. Kinnard, 42
 Kinney v. Harrett, 147
 Kitchell v. Beach, 593
 Knight v. Knight, 326
 Knox v. Knox, 181, 306
 Konvalinka v. Schlegel, 511

 La Fevre v. Toole, 810
 Laird's Appeal, 411

 Lake v. Robinson, 602
 Lambert v. Hooper's Ex'rs, 559
 Lamb, Francis, *In re*, 391
 Lambe v. Eames, 368
 Lamberts v. Paine, 453
 Lambkin v. Babb, 391
 Lancaster v. McBride, 432
 Landry v. Tomatia, 397
 Langdon v. Astor, 540
 Langford v. Gowland, 305
 Langford v. Little, 540
 Langham v. Wood, 350
 Langslow v. Langslow, 281
 Lanning v. Sisters of St. Francis, 279
 Lansing v. Lansing, 261
 Lant's Appeal, 102
 Lapage v. McNamara, 305
 Larned v. Bridge, 149
 Lasher v. Lasher, 311
 Latham v. Udell, 390
 Lathrop v. Dunlop, 543
 Lathrop v. Smalley's Ex'rs, 52
 Lawson v. Lawson, 28
 Lawyer v. Smith, 215
 Lay, *In re*, 394
 Leach v. Beattie, 362
 Leathers v. Greenacre, 393
 Leaycraft v. Simmons, 539
 Leeming v. Sherratt, 290
 Lees v. Mosly, 369
 Lees v. Wetmore, 551
 Lefevre v. Lefevre, 166, 340
 Leggatt v. Hart, 153, 493
 Leinaweaver v. Stoeper, 129
 Leland v. Adams, 454, 455
 Leland v. Hayden, 261, 262, 271
 Leland v. Smith, 431
 Lemann v. Bonsall, 396
 Lent v. Howard, 310, 478, 511
 Leonard v. Bell, 340
 Leonard v. Putnam, 433
 Leonard v. Steele, 311
 Leth v. Randall, 129
 Lewis v. Lewis, 392, 537, 544
 Lewis v. Smith, 129, 311, 312
 L'Huille v. Wood, 391
 Liceleoff v. Redman, 387
 Lide v. Lide, 436
 Liles v. Fleming, 129
 Lincoln v. Lincoln, 454
 Lindley, *Ex parte*, 170, 178
 Lindsay, *In re*, 412
 Lines v. Darden, 459
 Linton v. Crosby, 553
 Livingston v. Greene, 65

- Livingston v. Livingston, 547
 Locke v. Venable, 270, 271
 Lockwood v. Weed, 340
 Lofton v. Moore, 386
 Logan v. Bell, 100, 102, 542
 Long v. Aldred, 542
 Long v. Labor, 275
 Looekerman v. McBlair, 411
 Loomis v. Loomis, 543
 Lord Dursley v. Fitzhardinge Berkeley, 7
 Lord Falkland v. Bertie, 303
 Lord v. Brooks, 261, 272
 Lord v. Lord, 422, 425, 539
 Loring v. Blake, 555
 Loring v. Loring, 230, 359
 Louisville v. Trustees, 303
 Lovell v. Minot, 271
 Lovern v. Lamprey, 493
 Lowe v. Davies, 23
 Lowndes v. Norton, 547
 Lucas v. Goff, 395, 398
 Lucas v. Price, 551
 Luddington v. Kime, 411
 Lugg v. Lugg, 90, 540
 Luques v. Dresden, 340
 Lyles v. Digges' Lessee, 23
 Lyles v. Lyles, 41
 Lyman v. Conrey, 589
- Machem v. Machem, 283
 Maberly v. Turton, 502
 Mackell v. Winter, 599
 Magee v. O'Neill, 173
 Maggridge v. Thackwell, 303, 324
 Magraw v. Irwin, 432
 Mahnken's Case, 431
 Mahon v. Savage, 177
 Malcolm v. O'Callaghan, 292
 Malone v. Majors, 497
 Maudlebaum v. McDonell, 372
 Manice v. Manice, 108, 109, 510
 Mann v. Fuller, 35, 282
 Manners v. Manners, 363
 Mansfield v. Mansfield, 359
 Marcy v. Marcy, 428
 Marks v. Bryant, 395, 397
 Marsh v. Hague, 206
 Marston v. Roe *dem.* Fox, 87, 88,
 89, 91, 535, 536, 539, 541, 544
 Martin, *In re*, 591, 592
 Martin v. Eaton, 403
 Marx v. McGlynn, 305, 589, 591
 Mason v. Dunman, 392
- Massey v. Parker, 461
 Massie v. Griffin, 480
 Masterman v. Maberly, 391
 Masterson v. Cheek, 349
 Matson v. Magrath, 540, 541, 544
 Maxwell v. Maxwell, 480
 Maxwell v. Wettenhall, 478
 Mayor of Faverham v. Ryder, 304
 May v. Fletcher, 129
 May's Appeal, 276
 McAlister v. Butterfield, 283
 McAllister v. McAllister's Heirs, 176,
 178, 182
 McAlpine v. Foley, 180
 McAnulty v. McAnulty, 541
 McArthur v. Scott, 96, 97
 McBride v. McBride, 41
 McClaren v. Stainton, 260
 McCord v. Ochiltree, 303, 305
 McCormick v. McNeel, 130
 McCray v. Lipp, 368, 372, 387
 McCullom v. McKenzie, 541
 McCullough v. McKenzie, 92
 McCurdy v. Neall, 446
 McDaniels v. Bank of Rutland, 210
 McDaniels v. Lapham, 209, 210
 McElfresh v. Schley, 129
 McGavock v. Pugsley, 493
 McGlynn v. Billings, 210
 McGregor v. McGregor, 423
 McIntire's Adm'r's v. Zanesville, 170
 McKnight v. Read, 411
 McLachlan v. McLachlan, 49
 McLean v. Robertson, 379
 McLennan v. Wishart, 288
 McMahan v. Newcomer, 387
 McMahan v. Allen, 102
 McManus's Case, 130
 McMurdo, *In re*, 394
 McNamara v. Dwyer, 427
 McNaughten's Case, 573
 McNaughton v. McNaughton, 534
 McWilliams v. Nisly, 372
 Md. Mut. Benev. Society of Redmen
 v. Clendinen, Adm., &c., 29
 Meaking v. Cromwell, 310
 Mealey's Estate, 417
 Medworth v. Pope, 412
 Meeker v. Meeker, 436
 Meeks v. Olpherts, 365
 Meisenhelter's Will, 395, 396
 Melcher v. Buryer, 129
 Mellus v. Thompson, 428
 Melvin v. Lyons, 432
 Mensch v. Mensch, 49

- Merrill v. Emery, 199
 Merrill v. Preston, 414
 Meserve v. Meserve, 498
 Metcalf v. Clark, 428
 Mickley's Appeal, 65, 506
 Middleton v. Messenger, 598
 Milburn v. Milburn, 92, 544
 Millard's Appeal, 290
 Millar v. Turner, 411
 Millen v. Guerrard, 271
 Miller v. Atkinson, 178
 Miller v. Chittenden, 176, 305
 Miller v. Hoyt, 42
 Miller v. Huddleston, 379, 380
 Miller v. Miller, 436, 590
 Miller v. Phillips, 541
 Miller v. Rowen, 304
 Miller v. Stepper, 130
 Miller v. Thurgood, 422
 Millett v. Ford, 376
 Mills v. Farmer, 303, 324, 340
 Mills v. Mills, 311
 Milner v. Milner, 283
 Minott v. Prescott, 149
 Minot v. Boston Asylum & F. S., 166
 Minot v. Harris, 414
 Minot v. Paine, 260, 261, 262, 271
 Missionary Society of the Methodist Episcopal Church v. Chapman *et al.*, 304
 Mitchell v. Bryan, 349
 Mitchell v. Vickers, 398
 Mixon v. Roe, 463
 Moffett v. Moffett, 397
 Moggredge v. Thackwell, 340
 Moncrief v. Ross, 310
 Monroe v. Barclay, 435, 436
 Montague v. Allan, 592
 Montalvan v. Clover, 428
 Montefiore v. Montefiore, 392
 Mooers v. White, 446
 Moore v. Hood, 433
 Moore v. Lewis, 429
 Moore v. Lyons, 63
 Moore v. Magrath, 180
 Moore v. Paine, 416, 417
 Moore v. Raisbeck, 547
 Moore v. Shultz, 372
 Moore v. Smith, 600
 Moore v. Steidel, 129
 Moore's Heirs v. Moore's Devisees, 487
 Mordecai v. Boylan, 282
 Moresby, *In re*, 282
 More's Trust, 85
 Morey, Executrix of Michael v. Michael, 29
 Morgan v. Burrows, 71
 Morgan v. Davenport, 542
 Morgan v. Ireland, 541
 Morgan v. Stevens, 395, 396, 398
 Moriarty v. Martin, 230
 Morice v. Bishop of Durham, 172, 304, 340
 Morley v. Reynoldson, 282
 Morrell v. Dickey, 433
 Morrell v. Fisher, 180
 Morrell v. Morrell, 416, 417
 Morrison v. Semple, 454, 459
 Morrison's Case, 433
 Morse v. Morse, 544
 Morwan v. Thompson, 542
 Moss's Appeal, 261, 272
 Moulton v. Hutchinson, 28
 Mower's Appeal, 147
 Mowlem, *In re*, 411
 Mullen v. Helderman, 593
 Mulligan v. Leonard, 397, 398
 Mumford's Estate, 129
 Murray v. Blatchford, 189
 Murray v. Glasse, 260, 270
 Murray v. Oliver, 446
 Musgrave v. Parry, 411
 Musselman's Appeal, 431
 Nan Mickle, *In re*, 534
 Nash v. Morley, 178, 304
 Naylor v. Moody, 432
 Negroes, Jerry, *et al.* v. Jeremiah Townshend, 570
 Negus v. Negus, 92, 544
 Nellis v. Nellis, 66
 Nelson v. Kownslar, 129
 Newell's Appeal, 166
 New England Trust Co. v. Eaton, 271, 383
 Newton v. Bealer, 349
 Newton v. Reid, 461
 Nichols v. Allan, 176, 178, 304
 Nichols v. Butcher, 452
 Nichols v. Nichols, 362
 Nickerson v. Bowly, 361
 Nicoll v. Scott, 551
 Nightingale v. Burrell, 15
 Nix v. Bradley, 461, 462
 Nixon v. Rose, 461
 Nolan v. Gardner, 395
 Noonan v. Bradley, 433
 Norris v. Harrison, 270, 271
 Norris v. Thomson, 304

- Norris v. Thomson's Ex'rs, 178, 304
 Norru v. Thompson's Ex'rs, 304
 Northern Estate, *In re* (Salt v. Pym), 180
 Northey v. Strange, 410
 Noyes v. Southworth, 91, 544
 Nulrod v. Gilham, 349
 Nutt v. Norton, 91, 92
 Nutt v. Nutt, 391

 Oddie v. Brown, 288
 O'Driscoll v. Koger, 129
 O'Ferrall v. Simplot, 175
 Oldham v. Carleton, 129
 Olliffe v. Well's Ex'rs, 304
 Olmstead v. Brush, 50
 Olmstead and Bailey v. Gere, 568
 Olney v. Angell, 428
 Olney v. Howe, 347
 Olney v. Hull, 95
 O'Mahoney v. Burdell, 505
 O'Neill v. Farr, 436, 446
 O'Neill v. O'Neill, 395
 Onions v. Tyrer, 282
 Ordish v. McDermott, 539, 540
 Osgood v. Breed, 100
 Osgood v. Franklin, 432
 Osman v. Traphagen, 189
 Otis v. Beckwith, 343, 350
 Otis v. Prince, 172
 Otto v. Doty, 432
 Ould v. Washington Hospital, 176, 178, 340
 Outcalt v. Appleby, 283
 Outlaw v. Hurdle *et al.*, 41
 Overall v. Overall, 539
 Overbury v. Overbury, 90, 540

 Page v. Page, 395
 Paine v. Barnes, 149, 353, 355, 402
 Painter v. Painter, 283
 Palmer v. Palmer, 396
 Palmer v. Phoenix Ins. Co., 429
 Paris v. Paris, 260, 271
 Parish v. Parish, 540
 Parker v. Converse, 97
 Parker v. Felgate, 416, 417
 Parker v. Gerard, 361, 362
 Parker v. Mason, 271
 Parker v. Moore, 408
 Parker v. Nickson, 283
 Parker v. Parker, 100, 199, 305
 Parkhill v. Parkhill, 540
 Parkison v. Parkison, 392, 396
 Parrish v. Groomes, 497

 Parsons v. Miller, 395, 398
 Parsons v. Lance, 480, 540
 Parsons v. Parsons, 396
 Parsons v. Winslow, 172, 271
 Paschal v. Achlin, 304, 480
 Paske v. Ollatt, 579, 580
 Patch v. White, 71, 166
 Patterson v. Huddart, 452
 Patterson v. Pagan, 431
 Patterson v. Ransom, 331, 332
 Payne v. Payne, 446
 Pearce v. Carrington, 411
 Pearce v. Loman, 599
 Pearley v. Smith, 297
 Pearson v. Carlton, 411
 Pearson v. Pearson, 477
 Pedau v. Robb, 433
 Peillion v. Brooking, 461
 Pelletreau v. Rathbone, 433
 Pemberton v. Pemberton, 130
 Pennypacker v. Pennypacker, 593
 People v. Keyser, 189
 People v. Thompson, 305
 People v. Thurston, 573
 People v. Wayne Circuit Court, 148
 Perkins v. Hays, 461
 Pettes v. Brigham, 416, 417
 Pettingill v. Pettingill, 230
 Peyton v. Smith, 451
 Phaup v. Woolridge, 541, 543
 Phelps v. F. & M. B'k, 261
 Phelps v. Green, 362
 Philadelphia v. Davis, 128
 Philadelphia v. Fox, 303
 Philadelphia v. Girard, 305
 Phillips Academy v. King, 303
 Phillips v. McCombs, 258, 259
 Phimbe v. Nield, 260
 Phœbe v. Boggess, 392
 Pickering v. Stamford, 129
 Pidcock v. Potter, 567
 Pierce v. Burroughs, 261, 272
 Pierce v. Pierce, 396, 590
 Pike, *In re*, 261
 Pike v. Stephenson, 96
 Pink v. De Thuissey, 292
 Pitney v. Brown, 317
 Pitts v. Melser, 432
 Pitt v. Pelham, 191
 Plater v. Groome, 392
 Player v. Nicholls, 286
 Plumbe v. Neild, 271
 Pocock v. Attorney-General, 305
 Pond v. Allen, 169
 Poor v. Considine, 97

- Porter's Appeal, 392, 395
 Porter v. Trall, 429
 Portis v. Hill, 363
 Post v. Hover, 513
 Post v. Marson, 592
 Potter's Trust, 274, 276
 Potter v. Chapin, 303, 340
 Potter v. Potter, 129
 Potts v. Felton, 331
 Powell v. Attorney-General, 304
 Powell v. Board, 369, 370
 Powell v. Powell, 546
 Power v. Cassidy, 129, 178, 304
 Prater v. Whittle, 547
 Pratt v. Douglas, 422
 Pratt v. Mathew, 281
 Preacher's Aid Society v. Rich, 303, 305
 Prescott v. Prescott, 320
 Preston v. Melville, 260, 270
 Price v. Anderson, 260, 270, 271
 Price v. Brown, 429
 Price v. Parker, 543
 Prichard v. Thompson, 176
 Prince v. Hazleton, 390, 395
 Pringle v. Dunkley, 171
 Pringle v. McPherson, 282
 Pringley v. Dorsey, 305
 Provost v. Colyer, 310
 Public Adm. v. Watts, 392
 Pugh v. Pugh, 386
 Purdy v. Hoyt, 84
 Purse v. Snaphin, 283
 Puryear v. Edmondson, 497
 Pushman v. Filliter, 230
 Quackenbos v. Kingsland, 65, 370, 506
 Quick v. Quick, 560
 Quihampton v. Going, 283
 Quinn v. Shields, 177
 Quinn v. Hardenbrook, 153
 Radcliff v. Bagshaw, 601
 Ragsdale v. Booker, 42
 Raines v. Corbin, 129
 Ramsay v. Bell, 362
 Ramsdell v. Ramsdell, 352
 Randall v. Beatty, 537
 Randall v. Tuchin, 453, 455
 Rank v. Hanna, 129
 Rankin v. Rankin, 436
 Ralston v. Telfair, 304
 Randall v. Marble, 172
 Rand v. Hubbell, 271
 Rapp v. Matthias, 388
 Rathbone v. Dyckman, 311
 Rawle's Appeal, 469
 Rawlins v. Rawlins, 411
 Read v. Phillips, 391
 Read v. Strangways, 283
 Reade v. Silles, 304
 Reay v. Cowcher, 392
 Redmond v. Burroughs, 415
 Reed v. Douthit, 348
 Reed v. Heard, 260, 271
 Reed's Estate, 129
 Reese v. Hawthorn, 392, 395
 Reeve v. Attorney-General, 340
 Reeve v. Long, 411
 Reeves v. Garnett, 130
 Rehn v. Coles, 42
 Rex v. Searle, 573
 Reynolds v. Reynolds, 49
 Reynolds v. Robinson, 258
 Reynolds v. Torin, 421, 425
 Rhode Island H. Tr. Co. v. Com. N. Bank, 360
 Rich v. Rich, 361
 Rich v. Waters, 96
 Richards v. Miller, 316, 317, 318
 Richardson v. Knight, 230
 Richardson v. Paige, 296
 Richardson v. Richardson, 270, 272
 Richmond v. Vanhook, 554
 Ridgeway v. Lanphear, 368, 369, 376
 Ridley v. Coleman, 395, 398
 Ridley v. Ridley, 526
 Riggs v. Cragg, 260
 Ring v. Hardwick, 602
 Ringo v. Woodruff, 53
 Rinker v. Streit, 433
 Ripley v. Moysly, 36
 Ritter v. Fox, 282
 Rivers v. Exrs. of Rivers, 519, 520
 Rizer *et al.* v. Perry *et al.*, 340
 Robert v. West, 461
 Roberts v. Corning, 84
 Robert's Appeal, 272
 Robertson v. Gaines, 502
 Robins v. Quinliven, 369, 371
 Robinson v. Chamberlayne, 392
 Robinson, Estate of, 304
 Robinson, *In re*, 392, 480
 Rodgers v. Rodgers, 497, 537
 Roe v. Bacon, 456
 Roe v. Shell, 452
 Roe v. Vernon, 180
 Rogers v. Diamond, 331
 Rogers v. Hand, 127

- Roger's Trust, 297
 Rollins v. Henry, 8, 12, 13
 Roome v. Phillips, 552
 Rooee v. Mouldsdale, 392
 Rose v. Drayton, 446
 Roseboom v. Mosher, 191
 Roseboom v. Roseboom, 389
 Rose v. Quick, 43
 Ross v. Barclay, 550
 Ross v. Ross, 329
 Rossiter v. Simmons, 454
 Rotch v. Emerson, 304
 Roundtree v. Denson, 180
 Rouse v. Morris, 395
 Rouse's Estate, 292
 Russell v. Allen, 341
 Rusling v. Rusling, 592
 Rust v. Baker, 237
 Ruth v. Oberbrunner, 175
 Ryves v. Duke of Wellington, 427

 Sadler v. Sadler, 395
 Saltonstall v. Sanders, 178
 Salisbury v. Denton, 304
 Sampson v. Browning, 395
 Sampson v. Randall, 400, 405
 Sanderson v. White, 304
 Sanford v. Jackson, 311, 312
 Sanford v. Sanford, 129
 Santa Clara F. Academy v. Sullivan,
 181, 182
 Saunders v. Vautier, 288
 Saunders, *In re*, 394
 Savage v. Burnham, 310, 313, 424
 Savage v. Mears, 545
 Sayre v. Helme, 432
 Sayre v. Sayre, 283
 Seackville v. Ayleworth, 7
 Scarborough v. Boardman, 461
 Schad's Appeal, 42
 Schettler v. Smith, 84
 Schofield v. Walker, 590
 Scholefield v. Redfern, 271
 Scholl's Appeal, 353
 Schouler's Petition, 304
 Schrugham v. Wood, 343, 344
 Scottney v. Lomer, 169
 Scott v. Rhodes, 391
 Scott v. Guernsey, 363
 Scott v. Perkins, 352
 Scott v. Tyler, 171
 Scott v. West, 166, 169, 170, 174, 180,
 181, 183
 Scovel v. Roosevelt, 260
 Scruggs v. Driver, 430

 Seabrook v. Seabrook, 128
 Sears v. Putnam, 336
 Sears v. Russell, 15
 Seay v. Winston, 497
 Secor v. Sentis, 261, 262
 Sedgwick v. Sedgwick, 87
 Seguire v. Seguire, 304
 Seiter v. Straub, 591
 Selden v. Coalter, 392
 Sharon v. Simmons, 289
 Sharpless v. Mayor, 179
 Shaw v. Hussey, 353
 Shaw's Will, *In re*, 390
 Shawhan v. Loffer, 551
 Shear v. Van Dyke, 261
 Sheath v. York, 92, 545
 Shelley's Case, 309
 Shepherd v. Shepherd, 91, 539
 Sheriff v. Lowndes, 303
 Sherwood v. Sherwood, 282
 Shields v. Jolly, 176, 178
 Shields v. Smith, 552
 Shimer v. Mann, 368, 369, 375, 376
 Shirley, *In re*, 540
 Shore v. Wilson, 440
 Shotwell v. Mott, 170, 178, 304
 Show v. Snow, 600
 Shuman v. Shuman, 129
 Shumway v. Holbrook, 489
 Sibley v. Perry, 370
 Sibley's Trusts, *In re*, 239, 275
 Siceloff v. Redman, 368, 372
 Sigmen v. Hawn, 130
 Sikes v. Snarth, 392
 Sills v. Brown, 572
 Silvers v. Canary, 352
 Simpson v. Hornby, 129
 Simpson v. Moore, 260
 Sinclair v. Hone, 480
 Skellinger v. Skellinger, 129
 Skerrett v. Burd, 547
 Skipwith v. Cabell, 281
 Slack v. Bird, 250, 251
 Slade v. Barlow, 363
 Slanning v. Style, 358
 Slatter v. Carroll, 432
 Slaughter v. Cunningham, 432
 Slaughter v. Stephens, 546
 Slesch v. Thorington, 477
 Small v. Small, 436
 Smart v. King, 411
 Smith v. Adkins, 27
 Smith v. Attorney-General, 7
 Smith v. Bell, 306, 309, 355, 440
 Smith v. Butcher, 250

- Smith v. Curtis, 498
 Smith v. Edrington, 498
 Smith v. Edwards, 83, 109, 110
 Smith v. Fenner, 537
 Smith v. Harrington, 177
 Smith v. Hutchinson, 498
 Smith v. Jones, 493
 Smith v. Kniskern, 311
 Smith v. McConnell, 411
 Smith v. Meiser, 387
 Smith v. Meyers, 282
 Smith v. Nelson, 305
 Smith v. Peckham, 432
 Smith v. Rice, 95
 Smith v. Smith, 295
 Smith v. Velie, 261
 Smith, Lessee of, v. Jones, 495
 Smith, *Re*, 282
 Smith, Will of J. B., 331, 393
 Smithdale v. Smith, 396
 Sneed v. Ewing, 429, 538, 544
 Snelgrove v. Snelgrove, 554
 Snow v. Moore, 283
 Sohler v. St. Paul's Church, 303
 Sorresly v. Hollins, 304
 Souverbye v. Arden, 343, 349
 Sowers v. Cyrenius, 177
 Spangler v. Duke, 128
 Sparks v. White, 428
 Speidel's Appeal, 130
 Spencer v. Ward, 411
 Spraaay v. Stone, 86, 90
 Sprackling v. Ranier, 411
 Sprague v. Stone, 540
 Sproule v. Bouche, 260, 261, 262, 268, 271
 Squire's Estate, 544
 Stackpole v. Beaumont, 171
 Stagg v. Jackson, 310
 Stamper v. Hooks, 392
 Stamps v. Moore, 430
 Stark v. Hunton, 128
 Starkweather v. American Bible Society, 305
 Starling v. Price, 411
 Starrs v. Mason, 397
 State v. Griffith, 170, 176, 177, 178
 State v. Lautenschlager, 573
 State *ex rel.* State Agr. Soc. v. Timme, 165
 Stedfast v. Nicoll, 411
 Steele v. Fisher, 129
 Stephenson v. Harrison, 478
 Stevens' Admin'r v. Burgess *et al.*, 305
 Stevens v. Winship, 149
 Stewart v. Elliott, 590
 Stewart v. Stewart, 392
 Stinewan's Appeal, 130
 Stirling-Maxwell v. Cartwright, 432
 Stonywell's Case, 397
 Stover v. Kendall, 446
 St. Peter's Roman Catholic Congregation v. Germain, 73, 75
 Straker v. Wilson, 271
 Strauss v. Schmidt, 481
 Stroud v. Gwyer, 473
 Stuart v. Walker, 355, 360, 402
 Stuart's Heirs v. Coalter, 369
 Stubbs v. Houston, 548
 Sugden v. Lord St. Leonards, 559
 Sullings v. Richmond, 129
 Sullivan v. Mara, 424
 Sullivan v. Sullivan, 540
 Sullivan v. Winthrop, 478
 Suter, Admr. v. Hilliard, 304
 Sutton v. Askew, 129
 Sutton v. Hayden, 527
 Swails v. Bushart, 41
 Swan v. Hammond, 543
 Swazey v. American Bible Society, 170, 379, 380
 Sweet v. Boardman, 41
 Sweet v. Dutton, 414
 Sweigart v. Berk's Admr., 297
 Swift v. Duffield, 411
 Swinarton v. Hancock, 594
 Sykes v. Sykes, 395
 Taft v. Morse, 404
 Tainter v. Clark, 550
 Talbot v. Talbot, 91, 541
 Tappan v. Deblois, 303, 305
 Tappan's Appeal, 302, 305, 336
 Tarver v. Tarver, 432
 Tatum v. McClellan, 459
 Taylor v. D'Egville, 394
 Taylor v. Gould, 600
 Taylor v. Kelly, 43
 Taylor v. Rains, 102
 Taylor v. Soyer, 340
 Taylor Orphan Asylum, *In re*, 181
 Taylor, James, *In re*, 391
 Taylor's Appeal, 398
 Teed v. Morton, 237
 Terry v. Edminster, 534
 Terry v. Wiggins, 149, 355
 Thayer v. Wellington, 304, 384
 Theakston v. Marson, 392
 Thelluson v. Rendlesham, 180

- Thomas v. Howell, 283
 Thomas v. Wall, 391
 Thompson v. Bowman, 422
 Thompson v. Farr, 436
 Thompson v. Hawks, 591
 Thompson v. Hoop, 493
 Thompson v. Ludington, 95, 123
 Thompson v. Thompson, 52, 304
 Thompson, *Ex parte*, 393, 397
 Thompson's Estate, *In re*, 372
 Thompson's Trusts, *In re*, 414
 Thomson v. Shakespear, 178, 179
 Thomson's Appeal, 272
 Thorndike v. Loring, 15
 Thorndike v. Reynolds, 493
 Thorne's Case, 482
 Thornhill v. Hale, 363
 Thornton v. Thornton, 559
 Thorpe v. Thorpe, 180
 Thwaites v. Foreman, 379
 Tilden v. Tilden, 199
 Tillinghast v. Cook, 316
 Tilton v. Am. Bible Soc., 166
 Tilton v. Society, 71
 Timon v. Claffy, 156
 Tipton v. La Rose, 367
 Titus v. Titus, 379
 Tobias v. Ketcham, 310, 311, 313, 400
 Todd v. Rhoads, 433
 Todd's Will, 480
 Tomlin v. Jayne, 129
 Tomlinson v. Tomlinson, 544
 Tourton v. Flower, 428
 Towle v. Forney, 515
 Towle v. Swazey, 379, 381
 Townsend v. Downer, 432
 Townsend v. Early, 411
 Townsend v. Moore, 432
 Townsend v. U. S. Trust Co., 59
 Townsend's Appeal, 478
 Traver v. Schell, 108
 Treat's Appeal, 176, 178, 182, 301, 304
 Trevor v. Trevor, 283
 Trimble v. Dzieduzyiki, 433
 Trimble v. Woodhead, 365
 Trimmell v. Fell, 543
 Trower v. Butts, 410
 Trustees of Smith's Charities v. Northampton, 304
 Tucker v. Field, 590
 Tuller, *In re*, 542, 543
 Tullett v. Armstrong, 461
 Turnstall v. Pollard, 428
 Turbett v. Turbett, 468
 Turner v. Linam, 432
 Turner v. Scott, 42
 Turner v. Hallowell Sav. Inst., 360
 Twitty v. Logan, 8, 12
 Tylden, *In re*, 481
 Tyler v. Bell, 427
 Tyler v. Tyler, 542
 Tyner v. Reese, 386
 Tytherleigh v. Harbin, 236
 Upshaw v. Upshaw, 130
 Uthwatt v. Bryant, 456
 Utz, Estate of, 90
 Vail v. Vail, 261
 Van Arsdale v. Van Arsdale, 128
 Van Courtland v. Kipp, 446
 Vandemark v. Vandemark, 534
 Vandergrift's Appeal, 477
 Van Derzee v. Slingerland, 503, 505, 506
 Van Deuzer v. Gordon, 393, 394
 Van Doren v. Olden, 261, 262, 272
 Van Dyke v. Vanderpool, 250
 Van Dyke v. Van Dyke, 432
 Van Dyke's Appeal, 180, 432
 Vane v. Woods, 13
 Van Gorder v. Smith, 355
 Van Houten v. Post, 283
 Vanness, *In re*, 261
 Van Riper v. Van Riper, 127, 258
 Van Tilburgh v. Hollingshead, 250
 Van Wagenen v. Brown, 493
 Vardeman v. Ross, 551
 Vaughan v. Vaughan, 128
 Vaux's Appeal, 305
 Vawdry v. Geddes, 600, 602
 Verdier v. Verdier, 534
 Vermilya v. Beatty, 428
 Vernon v. Vernon, 129, 310, 311, 313
 Vidal v. Girard's Exrs., 173, 176, 182, 303
 Vincennes University v. Indiana, 303
 Vincent v. Starks, 433
 Vinton's Appeal, 272
 Waddle v. Terry, 129
 Wadley v. North, 599
 Wait v. Belding, 493
 Wait v. Breeze, 590
 Wait v. Huntington, 333

- Walker v. Shore, 598
 Walker v. Vincent, 875
 Walker v. Walker, 289, 304, 343, 349, 350, 392, 545
 Wallize v. Wallize, 284
 Walls v. Ward, 41
 Wall v. Wall, 349
 Wankford v. Fotherley, 526
 Walton v. Walton, 493
 Warburton v. Burrows, 391
 Ward v. Hearne, 430
 Ward v. Wolf, 553
 Wardwell v. McDonnell, 191
 Ware v. McCandish, 260, 270
 Ware v. Watson, 506
 Warner v. Bates, 230
 Warner v. Beach, 532, 534, 539
 Warner v. Durant, 108, 109
 Warner v. Warner, 412
 Warren v. Harding, 393
 Warren v. Morris, 423, 425
 Warren v. Taylor, 534, 547
 Warren v. Webb, 149, 359, 361
 Washburn v. Sewall, 303
 Waterman v. Whitney, 537
 Watkins v. Dean, 41
 Watkins v. Flora, 411
 Watkins v. Williams, 329
 Watson v. Hayes, 291
 Watson v. Watson, 598
 Watterson's Appeal, 130
 Watts v. Public Administrator, 391
 Watts v. Watts, 547
 Waugh's Appeal, 65
 Webb v. Jones, 543
 Webb's Case, 431
 Webber v. Sullivan, 591
 Webster v. Webster, 534
 Weeden v. Bartlett, 396
 Weeks v. Patten, 130
 Weeks v. Sego, 461
 Weir v. Chidester, 394
 Weir v. Mosher, 189
 Welch v. Welch, 559
 Weld v. Putnam, 478
 Welling v. Owings, 397
 Wells v. McCall, 462
 Wells v. Wells, 534, 539
 Welsh v. Brown, 478
 Werkheiser v. Werkheiser, 395
 West v. Gunther, 433
 West v. Knight, 303, 304
 Westbrook v. Vanderburg, 129
 Wester v. Wester, 396
 Wetmore v. Zabriskie, 279
 Whaley v. Dawson, 373, 364
 Whateley v. Spooner, 233
 Wheeler v. Allen, 236
 Wheeler v. Fellowes, 110, 123
 Wheeler v. Perry, 272
 Wheeler v. Wheeler, 189, 541
 Whelpley v. Loder, 591, 594
 Whitcomb v. Taylor, 355
 White v. Allen, 555
 White v. Fisk, 301, 336
 White v. Howard, 511, 513
 White v. Kane, 311
 White v. Trustees of British Museum, 330
 White v. Waite, 203
 White v. White, 16, 308
 Whitlock v. Hedden, 410
 Whitfield v. Clement, 282
 Whiting v. Whiting, 230
 Whitlock v. Wardlaw, 284
 Whitney v. Pharis, 59
 Whitney v. Whitney, 63
 Wickoff's Appeal, 539
 Widmore v. Woodroffe, 177
 Wilber's Case, 130
 Wilcox v. Rootes, 92, 544
 Wildeman v. The Mayor & City Council of Baltimore, 340
 Wilder v. Ranney, 514
 Wilkin v. Wilkin, 362, 363
 Wilkins v. Kennedy, 283
 Wilkinson v. Joughin, 283
 Williams v. Allen, 282
 Williams v. Conrad, 230
 Williams v. Cowden, 172
 Williams v. Freeman, 311
 Williams v. Kershaw, 304
 Williams v. Pearson, 176, 304, 340
 Williams v. Williams, 176, 304, 600
 Williams v. Worthington, 326
 Williams' Estate, 590
 Williamson v. Coulter, 440
 Williamson v. Williamson, 425
 Willock v. Noble, 543
 Wills v. Cowper, 191, 551
 Wilson v. Brownsmith, 36
 Wilson v. E. & N. A. R. Co. 362
 Wilson v. Harman, 297
 Wilson v. Mitchell, 587
 Wilson v. Moreley, 283
 Wilson v. Tappan, 430
 Wilson, Exr. v. Fosket, 90
 Wilson's Appeal, 594
 Wilson's Estate, 230
 Wiltbank's Appeal, 261, 272

- Winchester v. Forster**, 153, 491, 493, 494
Wingfield v. Wingfield, 414
Winn v. Bobb, 395
Wintermute v. Snyder, 250
Wis. Cent. R. Co. v. Taylor Co. 179
Wise v. Foote, 590
Wisely v. Findlay, 362
Withy v. Mangles, 413, 414
Witt v. Steere, 260, 270, 271
Wogan v. Small, 534, 535, 547
Wood v. Little, 361
Wood v. Medley, 392
Wood v. Rowcliffe, 180
Wood v. Tunnicliffe, 261
Wood v. White, 282
Wood v. Wood, 49, 129, 311, 312, 314, 486
Wood's Estate, 594
Woodbourne v. Woodbourne, 65, 505
Woodbridge v. Spooner, 42
Woodruff v. Young, 480
Woodruff's Estate, 260
Woods v. Monroe, 148
Woods v. Ridley, 395
Wootten v. Redd, 440
Wright v. Hardy, 570
Wright v. Methodist Episcopal Church, 415
Wright v. Netherwood, 540, 545
Wright v. Shaw, 96
Wright v. Tuckett, 270
Wright v. White, 271
Wright v. Wright, 330, 539
Wroughton v. Colquhoun, 379
Wynch v. Wynch, 292

Yarmouth v. Yarmouth, 303
Yarnall's Will, 390, 395, 396, 397, 398
Yerby v. Yerby, 538, 539
Young v. Edwards, 574
Young v. Hill, 261

Zanesville C. & M. Co. v. Zanesville, 304
Zahrt, In re, 311, 424
Zeisweiss v. Jones, 304
Zeiter v. Zeiter, 556
Zimmerman v. Zimmerman, 436

THE
AMERICAN PROBATE REPORTS.

THE AMERICAN PROBATE REPORTS.

LLOYD vs. WAYNE CIRCUIT JUDGE.

[56 Michigan, 236.]

ANTE MORTEM PROBATE.—THE MICHIGAN STATUTE.

A statute that provides for the probate of a will before the testator's death, leaving him with power to alter or revoke it, or, by removal out of the jurisdiction, to escape the effect and operation of it, is inoperative and void. The proceedings in such a probate could not be conclusive or in any proper sense judicial. *Nemo est hæres viventis.*

MANDAMUS to compel the court below to act.

John H. Bissell, for relator.

Ervin Palmer, for respondent.

COOLEY, C. J. The relator presented his will to the Probate Court for the county of Wayne for probate and allowance during his lifetime, under the statute of 1883. (Pub. Acts, No. 25.)

The leading object of the will appears to have been to exclude one son, and also the relator's wife, so far as it was within his power, from all share in the distribution of his estate.

The Probate Court heard the case, and decided against the will. The relator appealed to the Circuit Court, where a trial was entered upon before a jury, and after two witnesses had

been examined in support of the will, the circuit judge stopped the case, discharged the jury, and entered an order affirming the disallowance of the will by the Probate Court. This was done on the expressed ground that the act under which the proceedings were taken was unconstitutional. A principal reason for this conclusion was that the act failed to make provision for notice to the wife and an opportunity for her to be heard.

The relator thereupon applied to this court for a mandamus to compel the circuit judge to set aside his order and to proceed to a hearing of the case on the evidence.

As the order on the appeal is a final order affirming the action of the probate judge, upon which, if the proceeding is judicial, a writ of error would lie to this court, it is manifest that the relator is seeking to make the mandamus a substitute for the ordinary process of review, and his application might very properly be refused for that reason. Mandamus is a proper process for setting a court in motion, but not for reviewing and setting aside its affirmative judicial action when other suitable and effectual remedy exists. But as the parties have been fully heard in this case, and the reasons for declining to dispose of it on the merits at this time would be only technical, the matter of form will be overlooked.

The answer of the relator to the objection that the act in question does not provide for notice to the wife, is that the interests of the wife are saved to her, whatever may be the will. If she is dissatisfied with the provisions of the will, she may claim and have the same interests she would have in her husband's estate if no will were made. (How. Stat. § 5824.)

But this seems to be a very insufficient reason for failing to give the wife an opportunity for a hearing. A wife's interests in her husband's estate are not likely to be purely selfish and personal; the two co-operate in accumulating it, generally with an object in view that eventually it shall benefit children or others to whom they are mutually attached; and if the husband, while mentally incompetent, or in the hands or under the influence of scheming and mercenary

persons, is making disposition of it, no person is so justly entitled as the wife to make a showing of the facts to defeat it.

But there are some rights which the wife would have as widow, but which the husband might take away by will, which clearly give her a standing in court on the ground of interest. One of these is the first right to administer upon the estate. (How. Stat. § 5849.) This is an important and substantial right, and is given to the widow for that reason. But it is taken away if the husband makes a will and names an executor. Another is to name a guardian for children under the age of fourteen; for though the statute does not expressly recognize this, it is recognized by unwritten law that the mother's nomination of guardian will be confirmed, as of course, if no good cause to the contrary appears. But the father may appoint a guardian for minor children by will; and though by the statute, as amended in 1883, the appointment requires the approval of the probate judge (How. Stat. § 6311), the mother's preference of some other person would hardly be legal cause for disapproval. On either of these grounds, if there were no other reasons, the wife should have opportunity to be heard, if she alleges that a will not made freely or with due competency is being offered for probate.

But it may be said that these rights of the widow and mother are not property rights, and therefore not protected by the Constitution, but may be taken away by the Legislature at pleasure. It is to be observed, however, that the Legislature does not profess to take them away; they remain nominally protected by the law, and the Act of 1883 is expected to have effect while preserving them. The difficulty, then, is that the Act of 1883 makes no sufficient provision whereby, in the case of a married man, it can be carried into effect consistently with the preservation of rights which were before given, and which must be supposed to have been intended should remain. It therefore makes no sufficient provision for its own enforcement without conflict with other statutes not meant to be repealed, and is inoperative for that reason.

In all we have said on the subject we have assumed that the proceeding to probate the will of a living person under the statute was to be considered a judicial proceeding, and the order made thereupon a judgment. This is evidently the view taken by the proponent, who seems to assume that the adjudication will be final, though, in fact, it will at all times be subject to his own discretion or caprice. But if he is in error in treating the proceeding as judicial, we do not see that the Circuit Court had anything to do with the case. The Probate Court had acted and decided against the proponent, and we know of no authority for requiring the Circuit Court to take cognizance of appeals in cases not properly judicial, and to give its time and attention to the making of orders which are not judgments, and which the party seeking and obtaining them is under no obligation to leave in force for a day or an hour.

SHERWOOD and CHAMPLIN, JJ., concurred.

CAMPBELL, J. In this case, Lloyd attempted to have his will established during life in the Probate Court for Wayne county, and an appeal was taken from the Probate Court to the circuit. In that court the circuit judge was of opinion that the proceeding was extra-judicial, and refused to allow it to go on; but, instead of dismissing or quashing it on that ground, entered an order affirming the probate decree. *Mandamus* is now applied for to vacate that order.

There can be no doubt of the impropriety of the order of the Circuit Court. By affirming the probate order he asserted jurisdiction, and he had no right to affirm it without a hearing on the merits. But whether he should proceed to such a hearing is the principal question before us.

The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living are unheard of in this country or in England; and inasmuch as the statute only makes the decree effective in the single case of the establishment of the will and subsequent death without

revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire, or to oust the jurisdiction by change of residence, or to leave the will once rejected open to probate in the usual way after death, the proceeding is still more anomalous. I am disposed to think, with the circuit judge, that this is not in any sense a judicial proceeding which he was bound to consider or entertain.

This is the first instance in our jurisprudence in which an attempt has been made to compel a living person, as a condition of relief, to enter upon a contest with those who, until his death, can have no recognition anywhere, and who after his death are presumed to represent him, and not any hostile interest. The maxim that the living can have no heirs is as well settled by statute as by common law. Until a man dies it can never be known who will succeed him, even if intestate, and whatever may be the probability there is no certainty that a single one of the persons who have come in here to oppose the will may survive the testator. The law gives no preference to contingent expectations, and legally it is just as possible that the State may take by escheat, as that the persons now litigating, or any other more remote relatives, will become interested.

It is also within the power of relator to dispose of his entire property, not merely by a new will, but by sale or gift, and in such event there will be nothing for this will to dispose of, and possibly nothing for these or any other kindred to inherit. It is also competent for him to go into another county or State or country, either of which acts would put his estate beyond the jurisdiction of Wayne county; and either of the two latter may change the course of inheritance, or otherwise affect the disposal of his estate.

I cannot conceive it possible that a proceeding can be dealt with as judicial when the chief party to it will not be precluded by the decree from doing exactly as he might have done had the court never been called on to act at all.

This statute, which was probably designed to prevent the unseemly and disgraceful attempts, too often made, to defeat the enforcement of the last will of persons whose competency

to deal with their own affairs was never doubted or interfered with, has been so drawn as to remove none of the difficulties, but rather to make them worse. It is a singular, and in my judgment, a very unfortunate spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases. The practice which has usually prevailed in civil law countries, and also is said to have been customary in various parts of England (see Seld. Ecc. Jur. Test. 5), of having wills executed or declared in solemn form, or acknowledged before reputable public officers and a sufficient number of disinterested witnesses to render it unlikely that the testator is not acting with capacity and freedom, has been approved by the continued experience of most countries, and has saved them from the post mortem squabbings and contests on mental condition which have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators. There is no sensible reason why a will which is always revocable and contingent should not be established, presumptively at least, by such an acknowledgment as will suffice to prove a deed which is irrevocable; and where, as is usually the case abroad, such an acknowledgment is made before trustworthy officers, in the presence of known and reputable witnesses, and in the enforced absence of all other persons, the security against incapacity and incompetency is quite as strong as can be found in a contest before a court or jury that never saw the testator. A man's incapacity, if it exists, will not easily escape the notice of his disinterested friends and neighbors, and when they certify to his competency and freedom of action with their attention directly called to their own responsibility in doing so, they are seldom mistaken, and those who seek to impugn their action, if allowed to do it at all, should be compelled to assume the burden and risk themselves. But this is not judicial action.

In the proceedings of various kinds familiar in England,

where conveyances are made effective by acknowledgment and enrollment before various classes of public officers or tribunals, it was never deemed proper or necessary to bring general heirs presumptive before the acknowledging officer, in order to give efficacy to transfers in fee simple, either of men or women, although they are as clearly affected in their prospects of inheritance as they would be by a will. And in the cases where testimony is to be perpetuated for use in future controversies, the rule is inflexible that, no matter how great the probability of inheritance may be, the heir presumptive is not either a competent or permissible party to such litigation; and this is so even in case of estates tail, and although the circumstances are as strong as possible against the chances of any change. (*Earl of Belfast v. Chichester*, 2 Jac. & W. 439; *Allan v. Allan*, 15 Ves. 130; *Lord Dursley v. Fitzhardinge Berkeley*, 6 Ves. 251; *Sackvill v. Ayleworth*, 1 Vern. 105; *Smith v. Atty.-Gen.*, cited, 6 Ves. 255 and 15 Ves. 133.)

The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs. Our statutes have never undertaken, and do not in this case undertake, to give to the heirs any interest which will even be fixed by this probate, or which may not be cut off at any time by their own death, or by relator by new will or conveyance. It is by no means free from doubt what classes of probate proceedings under our system are to be treated as judicial proceedings in the proper sense of that term; and it is not important here to consider that question, because this proceeding is not even a suit for probate. There has never been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of such estates. This rule is so general that in some States devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach

lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately.

This statute does not attempt to change the place of ultimate probate, and it does not make a decree against the will either a bar or even admissible to prevent future probate after death. It makes no provision for making a finding either way evidence for any purpose during testator's life, so as to negative testamentary capacity, or otherwise to affect him. And it has no force for any purpose so long as he lives.

I am of opinion that the statute is inoperative, as not within any recognized judicial power, and that the courts cannot be called upon to administer it, and that

The mandamus should vacate the whole proceedings.

SHERWOOD and CHAMPLIN, JJ., concurred.

BRYAN vs. MORING.

[94 North Carolina, 694.]

DEVISAVIT VEL NON.—HEIR.—RECEIVER.

An essential element in the exercise of the extraordinary jurisdiction of appointing a receiver, is the danger of the entire loss of the property. So, a receiver will not be appointed to take possession of land and receive the rents and profits, unless the plaintiff has established an apparent right to the property, and the insolvency of the defendant is alleged and proved.

A receiver cannot be appointed in a proceeding to establish a will.

Where, on an issue of *devisavit vel non*, the jury found that a certain paper writing was the will, and certain persons, parties to the action, were in possession of the land of the testator, claiming under a prior script, it was held error to appoint a receiver of the rents and profits, especially when there was no allegation of insolvency against the party in possession.

(*Twitty v. Logan*, 80 N. C. 69; *Rollins v. Henry*, 77 N. C., 467, cited and approved.)

THIS was a motion to appoint a receiver of the personal and real estate of William C. Faucette, deceased, heard before

Judge Gilmer, at Fall Term, 1885, of Chatham Superior Court.

The motion was made in a cause pending in said court, concerning the probate of the last will and testament of William C. Faucette, in which the plaintiffs were the propounders and the defendants the *caveators*, and also the propounders of a will alleged to have been published subsequent to the former.

The first will bore date the 21st day of July, 1879, under which the propounder, Rosa J. Bryan, claimed the land as sole heir and devisee. This will was admitted to probate in common form in the Probate Court for the county of Chatham, on the 18th day of July, 1883, and there being no executor appointed in said will, Elias H. Bryan was appointed administrator of William C. Faucette, with the will annexed.

E. V. Mooring and her children, claiming to be the legatees and devisees under a will made by the said W. C. Faucette, of date the 12th of July, 1880, entered their *caveat* to said will of July, 1879, and propounded at the said time the last alleged will for probate. Issues were made up and submitted to the jury, to determine which of the two paper writings was the last will and testament of the deceased William C. Faucette. The jury found the paper writing, of date the 12th of July, 1880, to be the last will and testament of the said W. C. Faucette, and thereupon the court adjudged that the paper writing of 12th of July, 1880, was the last will and testament of William C. Faucette, deceased, and adjudged that the finding of the jury, with a copy of the judgment, be certified to the clerk of the Superior Court of Chatham county, that he might proceed as the law directs.

From this judgment the propounders of the first will appealed to the Supreme Court.

Thereupon, John M. Mooring, who was one of the *caveators*, as next friend of the infant children of E. V. Moring, moved for the appointment of a receiver, based upon the following affidavit filed by him:

"1. That he is one of the *caveators* of the will of 1879, and a party to this action, which is an action to set up an alleged lost will of the late Wm. C. Faucette, dated 12th July, 1880,

in which all of his property, both real and personal, is devised to the *caveators*, Emma V. Moring and her children ; a prior will, dated 21st July, 1879, having been offered for probate in common form by the propounders, at which time Elias H. Bryan was appointed administrator of the late W. C. Faucette, with the will of 1879 annexed, and entered into bond in the sum of six thousand dollars ; that as such administrator, as affiant is informed and believes, he has come, or should have come, into possession of personal property to the amount of some twelve thousand dollars in value.

"2. That a large portion of the estate of the late Wm. C. Faucette consists of valuable real property in this county, which is now in possession of Rosa J. Bryan, one of the propounders, and the sole heir and devisee under said will of 1879, and that the rents accruing upon said land should be about one thousand dollars per annum.

"3. That Wm. C. Faucette died on the 26th day of June, 1883.

"4. That Elias H. Bryan, so this affiant is informed and believes, and so Rosa J. Bryan testified on the trial of this cause, is suffering from a disease called softening of the brain, and has been for some time, becoming more and more weak mentally, until now he is unable and incapable of attending to his business affairs, and that by reason of said *dementia*, the *caveators* are in great danger of loss by improper management of said estate.

"5. That the jury found that the will of 1880 was the will of the late Wm. C. Faucette ; judgment was rendered in favor of the *caveators*, from which the propounders appealed.

"6. That by reason of the pendency of the appeal in this cause, and the other facts stated, that it is necessary to have a receiver appointed to preserve the said property from loss and waste, until this issue as to the will is decided."

His Honor made the following order :

"Upon a motion submitted for a receiver in this matter, upon the affidavit filed, it is ordered that William E. Anderson be appointed receiver of all the personal property of William C. Faucette, and also of the rents and profits of the lands

possessed by William C. Faucette, at his death, during the pendency of the appeal. The receiver will give bond in the sum of fifteen thousand dollars, and make report to each term of the court of his receipts and disbursements.

“R. J. Bryan and E. H. Bryan, and their agents, are enjoined from receiving or interfering in any way with the property herein described, except that the said receiver may rent, upon proper security, any of the said land to the said Rosa J. Bryan.”

From so much of the above order as appoints a receiver for the real estate, and enjoins Rosa J. Bryan and E. H. Bryan, and their agents, from receiving or interfering in any way with the said real estate, Rosa J. Bryan and E. H. Bryan appeal to the Supreme Court.

F. H. Busbee, for plaintiffs.

John W. Graham and *Thomas Ruffin*, for defendants.

ASHE, J. (after stating the facts). The facts of the case are so imperfectly stated, that we are not certain that we can come to a correct conclusion upon the point presented by the appeal from the ruling of the judge in appointing a receiver to take charge of the real estate of W. C. Faucette.

The will of 1879, which was admitted to probate in 1883, gives all the property of the testator to his sister, Sally A. Faucette, and his brother, Henry C. Faucette, one half to each; and if either should die without children, then his or her part to go to the survivor. The case shows that Henry C. Faucette died before the testator, and we take it, unmarried and without children. But whether Sally still lives does not appear, and there is nothing in the case to show how Rosa J. Bryan is entitled to the land that belonged to the testator, except in the affidavit filed by John M. Mooring as the basis of his application for a receiver, where it is stated that Rosa J. Bryan is sole heir and devisee under the will of 1879. We must assume that this statement would not have been made if she did not claim title to the land in some way under the will, possibly as

heir to Sally A. Faucette, who may be dead. But in any way it seems to be conceded by the propounders of the last will that she claims as heir, and is in possession of the land, and in receipt of the rents and profits. That being so, ought she to be deprived of the enjoyment of the rents and profits before the *caveators* shall establish their right to the land, which can only be done by establishing the will of 1880 as the last will and testament of W. C. Faucette.

They assert that by the verdict of the jury they have at least shown an apparent right to the land, and that is sufficient, although there has been an appeal in the case to give them a receiver to take charge of the land, to secure the rents and profits, and hold them subject to the final determination of the case, leaving open the issue of *devisavit vel non*. But admitting that the verdict of the jury has established an apparent right, that of itself was no sufficient ground for the interposition of the court to take the land into the custody of the law, and deprive the owner of the pendency of the profits. One essential element in the exercise of this extraordinary jurisdiction of the court, is the danger of the property being lost or its value greatly impaired—as in the case of rents and profits of land, that they will be squandered and lost by the insolvency of the party in possession. Hence, in such a case, it is necessary that the insolvency of the party in possession should be alleged and shown. This rule is expressly laid down in the case of *Twitty v. Logan* (80 N. C. 69), where it is held, “an order appointing a receiver will not be made when the party applying for the same has not established an apparent right to the property in litigation, and when it is neither alleged nor shown that there is a waste or injury to the property, or *loss of the rents and profits*, by reason of the insolvency of the adverse party in possession.

In *Rollins v. Henry* (77 N. C. 467), it was held by the court that “whenever the contest is simply a question of disputed title to property, the plaintiff asserting a legal title in himself, against a defendant in possession, receiving the rents, &c., under a claim of legal title, even if the defendant is insolvent, a receiver will be appointed only when plaintiff sets

forth an apparently good title, not sufficiently controverted in the answer, and shows *imminent danger of loss by defendant's insolvency.*"

The rule laid down in the first cited case, and the case of *Rollins v. Henry* (*supra*), is fully and directly supported by *Vane v. Woods* (46 Miss. 120), where it is held, "the defendant will not be deprived of his possession by a receiver, unless it is made to appear that there is a great risk of ultimate loss of the property, and insolvency on the part of the defendant, so that he will be unable to respond to a final decision." And *High on Receivers* thus lays down the doctrine: "There are two conditions, both of which must combine to warrant a court of equity in granting a receiver as against a defendant in possession. These conditions are, first, that plaintiff must show a strong ground of title, with a reasonable probability that he will ultimately prevail; and second, that there is imminent danger to the property or its rents and profits, unless the court shall interpose."

But in this case there is no allegation of the insolvency of Rosa J. Bryan. There is no statement in the affidavit of John M. Moring that she is insolvent, and that she will be unable to respond to the final judgment in the case, in consequence of her insolvency, and this, as shown from the authorities cited, is an essential condition to be alleged and shown in a proper case for the appointment of a receiver to take into possession lands, or the rents and profits thereof, that may be the subject of the litigation.

But, moreover, we do not think this a proper case for a receiver of the lands and rents, &c. It is not an action to recover land, and to secure the rents and profits as incidental to the final recovery, but a proceeding to establish a paper writing as a last will and testament; and we are not aware of any authority for the appointment of a receiver in such a case.

Our conclusion, therefore, is, that there was error in so much of the order made in the court below as gave to the receiver authority to take charge of the rents and profits of the land possessed by W. C. Fancette at his death, and enjoining R. J. Bryan and E. H. Bryan, and their agents, from receiving

or interfering with the said land, and the rents and profits thereof, and so much of the said order is reversed.

Let this be certified to the Superior Court of Chatham county.

Error. Reversed.

KENT vs. DUNHAM.

[142 Massachusetts, 216.]

DEVISE TO DESTITUTE KINDRED.—PERPETUITY.—INDEFINITE
ACCUMULATIONS.—UNCERTAINTY.

A devise to two persons named, "their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid," is void. It cannot be upheld as a public or charitable trust, and it is invalid and without effect as against public policy.

BILL in equity, by two heirs at law of Josiah Dunham, who died on April 28, 1857, to have a certain trust created by the residuary clause of his will declared void. The defendants demurred to the bill for want of equity. Hearing, on bill and demurrer, before Judge C. Allen, who reserved the case, which appears in the opinion, for the consideration of the full court.

C. H. Hill and *L. S. Dabney*, for defendants.

R. M. Morse, Jr., and *H. Dunham*, for plaintiffs.

DEVENS, J. The gift in the residuary clause of the will to "Samuel Leeds and Josiah Dunham, Jr., their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best, for the aid and support of those of my children and

their descendants who may be destitute, and in the opinion of said trustees need such aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. The language used, as well as the declared purpose, shows that it is a gift in trust for the benefit of those descendants of the testator who should thereafter, through an indefinite period of time, become destitute and in need of aid and support. The words import that the bequest is ultimately to be administered by others than the trustees named, and that the testator has not sought to repose a special confidence in them exclusively, but to establish a permanent trust for which trustees are ultimately to be appointed according to the ordinary rules of courts of equity. That such a gift is too remote, as tending to create a perpetuity when it is to be held for the benefit of those who may not have been living at the time of the testator's death, or that of his children, and who may not come into being until many years thereafter, cannot be controverted, unless it can be sustained as a public charity. (*Nightingale v. Burrell*, 15 Pick. 104; *Brattle Square Church v. Grant*, 3 Gray, 142; *Sears v. Russell*, 8 Gray, 86; *Thorndike v. Loring*, 15 Gray, 391.) The Attorney-General has therefore been made a party to this bill, as well as all the descendants of the testator. (*Jackson v. Phillips*, 14 Allen, 539.)

A public or charitable trust may be indefinite in duration, and, its general object or purpose, as indicated, being charitable, the application and selection of the particular objects or individuals who are to receive its benefits may be confided to those who are its trustees. That a gift should have this character, there must be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. If a trust were created for the benefit of the poor of a particular town or parish, or of persons of a specified class or occupation, as seamen, laborers, or mechanics, it would not be doubted that it would be good as a charity. So, if a sum were bequeathed, the income of which, from time to time, or in the discretion of the trustee,

tees, was to be applied to the relief of the destitute, by distribution of fuel or provisions, or in any other similar defined mode, or as the trustees might deem most expedient, the gift could be enforced as a public charity.

The gift in the case at bar is solely for the benefit of the children of the testator and their descendants. The only public interest there can be in connection with it is, that, whereas there may be hereafter certain destitute persons, descendants of the testator, who might otherwise become a public charge, they will be entitled to relief from this fund. This legacy, it will be observed, is readily distinguishable from one by which the income of a fund is devoted to the poor of a particular town or parish, preference being given to the descendants or the relations of the testator. In such a donation there is a public object, as they are thus provided for only as a part of the poor who are to receive the benefit of the charity, although a preference is given them, on account of their descent or relationship, in its distribution.

There are certain English cases, which, as the trustees contend, afford strong ground for holding this legacy to be a public charity. In *Attorney-General v. Bucknall* (2 Atk. 328), decided in 1741, the point decided was, that any person, though the most remote in the contemplation of the charity, might be a relator in an information in reference thereto. The facts, as stated in the case, do not show that any question arose as to whether the bequest was a public charity, the only inquiry apparently being whether the relator was one of the poor relations who were the objects of the bounty. In *White v. White* (7 Ves. 423), decided in 1802, it was held that a bequest to poor relations of two families for putting out their children as apprentices, the duration of which would have exceeded the limits allowed by law, unless it was a public charity, might be executed by putting out those who were then ready as apprentices. There was no discussion of the subject in the opinion of the Master of the Rolls, Sir William Grant. In *Attorney-General v. Price* (17 Ves. 371), decided in 1810, there was a direction to pay £20 per annum to the testator's poor kinsmen in the county of Brecon, which was held good as a charity,

apparently upon the authority of *Isaac v. De Fries* (Ambl. 595), and on the ground that it was entitled to have perpetual continuance for the benefit of a particular class of poor. In *Gillam v. Taylor* (L. R. 16 Eq. 581), it was held that, where the testator gave the residue of his real and personal estate to trustees for investment in their joint names, and directed the interest from time to time to be paid to such lineal descendants of a person named, "as they might severally need," the gift was charitable; and that it need not be distributed to those actually poor, but only to those relatively so; and thus that, if all the descendants except one had £20,000 a year, and the latter £10,000 a year, he would be entitled. This decision is treated with but scant respect in *Attorney-General v. Northumberland* (7 Ch. D. 742), by Sir George Jessel, M. R., where it is said that such a charity could only be good in favor of those actually poor. In this last case, the gift gave only a preference to the kindred of the testator in the distribution of the income of the trust fund to the poor, which was provided for annually.

These cases do not fully sustain the position that the legacy here in question can be upheld as a public charity. In all of them there were persons so situated as to be entitled to the benefit of the charity, so that an indefinite accumulation was not to be permitted in favor of a class which might never have an existence, or might not come into existence within any period of time when its connection with the testator could be traced.

Bequests in favor of poor relations also are for a far more extensive class than descendants. While the failure of issue, and thus the termination of the line of lineal descent, is comparatively common, the ancestors of every person are indefinitely numerous, and there can be no failure of collateral relations except such as may arise from the impossibility of tracing the descent of the testator.

Without desiring to express any opinion as to whether we should hold it to be our duty to follow the doctrine of these cases, if the question presented by the case at bar were fairly within them, the reasons why the gift of the testator cannot be sustained as a public charity appear to us entirely sufficient.

It is the policy of the law to prevent indefinite accumulations of property for the benefit of individuals. The descendants of the testator are now, and have been since his decease, in comfortable circumstances. Not only may a long time elapse before any descendant will exist who can be termed a "destitute" person, but such a time may practically never occur, as it may be at so distant a period that descent cannot be traced, or the event of the failure of descent from the testator may render it impossible that it should ever occur. In the expectation of the remote contingency that there shall be a descendant who is a destitute person, the fund is to be permitted to accumulate, if the will of the testator is followed. If the line of descent from the testator fails, it will have been accumulated for his heirs, it may be in a remote generation. There is no general public object sufficient to justify this accumulation, in the possible advantage which the public may obtain by having the descendants of the testator protected from beggary, and thus from becoming a public charge. To establish, as a permanent charity, a provision for a single family, and thus, it may be, to permit an indefinite accumulation of property, which might eventually be solely for the benefit of the testator's heirs, and those who may claim under them, would be foreign to the general principles of our law on this subject, and cannot be justified by so slight a prospective public benefit.

The result is that the portion of the residuary clause of the testator's will, which seeks to establish a trust in two-thirds of the residue of his estate for the benefit of his children and their descendants "who may be destitute, and in the opinion of said trustees need such aid," must be decreed to be invalid and without effect.

Demurrer overruled.

HENDERSON vs. HENDERSON.

[64 Maryland, 185.]

THE RULE IN SHELLEY'S CASE.—TRUST FOR CHILDREN.

In the construction of wills the intention of the testator must be sought for and ascertained. If that intention is not in conflict with the settled policy of the law, it will always be respected and allowed to operate.

The intention of the testator must in most cases be gathered from the peculiar terms of the instrument under consideration, without reference to artificial and technical rules of interpretation.

In this State, even before the Act of 1862, ch. 161, the rigidity with which the *Rule in Shelley's Case* has been applied elsewhere, seems to have been somewhat relaxed; and it has been held that the word "issue" in a will is sometimes a word of limitation, and sometimes of purchase according to the context of the devise, and the apparent intention of the testator.

Where the testator manifests an intent to give the first taker only an estate for life, and uses the words "issue," "sons," "children," or "descendants," the case will be withdrawn from the operation of the rule.

In regard to executory trusts, in courts of equity the rule will be adhered to only in cases literally within it, and where circumstances take the case out of the letter of the rule, it will be held subservient to the manifest intention which led to the creation of the trust.

APPEAL from the Circuit Court of Baltimore city.

The bill in this case was filed by the appellants against the appellees, to obtain the construction of a clause in the will of Mrs. Eliza C. Henderson, making disposition of certain leasehold property. The appeal was taken from the decree of the court below giving a construction to said clause. The case is stated in the opinion of this court.

The cause was submitted for the appellants to Chief Justice Alvey, JJ. Yellott, Stone, Miller, Robinson, Irving, Ritchie, and Bryan.

Carlton Shafer and *J. Wilson Leakin*, for appellants.

No counsel for the appellees.

YELLOTT, J. This record discloses the following facts: Eliza C. Henderson, late of Baltimore city, on the 8th day of

November, 1876, executed her last will and testament ; in the second clause of which she says :

“ I give, devise, and bequeath unto my son, William Thomas Henderson, his heirs, executors, and administrators, all those two lots of ground and improvements, situate on the north side of N. Gay street, in the city of Baltimore, and known as Nos. 181 and 183, in trust and confidence nevertheless, to hold, have, receive, and collect all the rents, issues, and profits thereof, and use and dispose of the same as follows, that is to say, to pay all ground rents, taxes, water rents, repairs, and other expenses that may be necessary to keep the said property in good, tenantable condition, and unincumbered, and to disburse the net proceeds that may remain as follows : to reimburse himself all proper expenses and commissions, and to divide the balance equally among and between my three children, Robert Brown Henderson, Margaret Jane Lewis, and himself, William Thomas Henderson, share and share alike, and in case of the death of any one or more of my said children, then the share or shares of such child or children to go to his or her lineal descendants, and in case either of my said children shall die without leaving issue, then the share of such child shall go to my surviving child or children equally, share and share alike.”

This will, with its codicils, was admitted to probate on the 22d day of December, 1883.

The said William Thomas Henderson, the trustee named in the will, died in the lifetime of his mother, the testatrix, leaving two children, William Andrew Henderson and Robert Keen Henderson, infant defendants in the court below, and appellees in this record. The other appellees, defendants below, are John Henderson Lewis, Albert Urband Lewis, and Margaret Lewis, who are the children of Margaret Jane Lewis, and grandchildren of the testatrix, and are infants residing in the State of Virginia. The bill of complaint was filed by Robert Brown Henderson and Margaret Jane Lewis, surviving children of the testatrix, uniting therein with John A. Lewis, husband of said Margaret Jane, and David Henderson, execu-

tor of said will, for the purpose of obtaining a judicial construction of the clause which has been transcribed.

In the construction of wills the intention of the testator must be sought for and ascertained. If that intention is not in conflict with the settled policy of the law, it will always be respected and allowed to operate. It is therefore apparent that the donor of property by a testamentary disposition has an almost unlimited scope within which to exercise his judgment or to gratify his caprice. Multitudes of wills are being brought into courts for construction, and seldom do we find two of them exactly similar. Unlike deeds of conveyance in this respect, they are as multiform and distinct in their structure, phraseology, and purposes as are the mental operations, the motives and feelings of the different testators. Thus it is that, apart from the enunciation of some general principles applicable to all transmissions of property by last will and testament, the citation of authorities is of but little utility. The exercise of what seems to be sound judgment and common sense may, however, be safely invoked and relied upon in the ascertainment of intention. The peculiar situation of this testatrix and the relations subsisting between her and the recipients of her bounty, must therefore be considered in connection with the language of the document itself, in order that we may be fully enlightened in regard to the real motives and intent by which she was controlled in the execution of this will.

At that time Eliza O. Henderson had three children. Two of these children are still living, and her son William Thomas died after the execution of the will, but before the decease of his mother. Robert Brown Henderson and Margaret Jane Lewis contend that on the death of their mother they each became entitled to, and they now claim an absolute estate in, one third of the property in question. Now it seems to be entirely consistent with the suggestions of reason and common sense to suppose that if Eliza O. Henderson intended that as soon as her death occurred, each of her three children should have an absolute estate in one third of her property, she would not have made a will creating a trust which would have been wholly unnecessary and a mere work of supererogation, as by

mere operation of law each of her three children, or their heirs, would have become entitled to an equal distributive share of said property. We are thus led to inquire for what purpose was the will made and the trust created? Evidently in order that her bounty might not fail to be extended to her grandchildren. If a third was left to a son or daughter as an absolute estate, he or she might, subsequently to the death of the testatrix, dispose of his entire share and waste the proceeds in prodigal expenditures, and the grandchildren would be left destitute. But by creating the trust her children enjoyed the income during their lives, and the *corpus* of the estate was protected and kept intact for the benefit of her descendants in the second degree. This seems to have been the intention of the testatrix in so carefully protecting the property by the creation of a trust, and by requiring the active intervention of a fiduciary agent. In regard to the construction of wills, this court, adopting the language of Chancellor Kent, has said that "though we are not to disregard the authority of decisions, even as to the interpretation of wills, yet it is certain that the construction of them is so much governed by the language, arrangement, and circumstances of each particular instrument, that adjudged cases become of less authority, and are of more hazardous application than decisions upon any other branch of the law." (*Douglas v. Blackford*, 7 Md. 22.)

The intention of the maker of a will is the main and important question presented in its construction. That intention must in most cases, be gathered from the peculiar terms of the instrument under consideration, without reference to artificial and technical rules of interpretation. But in this controversy an effort has been made to apply the rule in Shelley's case, and thereby create an absolute vested estate in the children of the testatrix. Preston, in his *Treatise on Estates*, p. 263, thus defines the rule:

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of any estate, of an interest of the same legal or equitable quality, to his *heirs* generally,

or *heirs of his body*, as a class of persons to take in succession, from generation to generation, the limitation to the *heirs* entitles the ancestor to the whole estate." In England the operation of the rule seems to have been always confined to the use of the word *heirs* or *heirs of the body*, and the rule did not apply if the words children, issue, or descendants were employed. The reason for this distinction is apparent. A man may have children not born in lawful wedlock; his issue may be illegitimate; his descendants bastards. Property may be devised to them, but they necessarily take by purchase, and a new stock is thus created. The word *heirs*, however, implies legitimacy and a capability of taking by inheritance. Hence the rule was held not to apply unless the word *heirs* was used in the instrument. (*Doe, Lessee of the Earl of Lindsey v. Colyear*, 11 East, 564; *Goodtitle on the Demise of Sweet v. Herring*, 1 East, 264; *Lowe v. Davies*, 2 Ld. Raym. 1561; 2 Roll. Ab. 417.)

In this State, even before the Act of 1862, ch. 161, the rigidity with which the rule has been applied elsewhere seems to have been somewhat relaxed; and it has been held that the word issue in a will is sometimes a word of limitation and sometimes of purchase, according to the context of the devise and the apparent intention of the testator. There can be no doubt that where the testator manifests an intent to give the first taker only an estate for life, and uses the words issue, sons, children, or descendants, the case will be withdrawn from the operation of the rule. And in regard to all executory trusts, it is undoubtedly true that in courts of equity the rule will be adhered to only in cases literally within it, and that where circumstances take the case out of the letter of the rule, it will be held subservient to the manifest intention which led to the creation of the trust. (*Lyles v. Digges' Lessee*, 6 H. & J. 364; *Horne v. Lyeth*, 4 H. & J. 431; *Dickson v. Satterfield*, 53 Md. 320; 4 Kent Comm. 240.)

Now, as the intention of the maker is to be gathered from the whole will, we find the testatrix, in the fifth clause, giving an estate for life to her sister, and then to Margaret Lewis and "her *heirs forever*," while, in the clause now to be construed,

she carefully avoids the use of the word *heirs*, and designates her grandchildren as "lineal descendants" in one place, and as "issue" in another. This careful avoidance of words of limitation and inheritance is suggestive of an earnest solicitude on the part of a skillful draughtsman to escape from the operation of the rule in Shelley's case, which he knew would run counter to the intentions of the testatrix.

It has been argued that if the estate did not vest absolutely in the children of the testatrix, the will would create a perpetuity. Undoubtedly, if this trust had been created by deed there would have been some soundness in this argument. But in the case of wills, the Act of 1825, ch. 119 (§ 305 of art. 93 of the Code), provided against the omission of testators. "It assumes that a testator may not know that terms of limitation are necessary, and directs that if no word of perpetuity are added to the devise, it shall be intended that the whole estate and interest of the testator was designed to be passed." (*Hammond v. Hammond*, 8 G. & J. 441; *Fairfax et al. v. Brown*, 60 Md. 55.)

There being no words of limitation or perpetuity in this clause of the will, upon the death of each of the life-tenants, by the operation of this statute, an absolute estate vests in the next takers; and upon the death of all the life-tenants, the trust ceases to be executory and becomes executed, the object for which it was created having been accomplished.

It seems therefore to be clear that the children of William Thomas Henderson are each entitled to the one-sixth absolutely of the leasehold property mentioned in the clause of the will thus construed. It is also apparent that a trustee should be appointed to execute the trust in the place of William Thomas Henderson, deceased; and that he should hold one third of the property for each of the surviving children of the testatrix; and that on the death of either of said children of the testatrix, the share thus held should go, absolutely and free from the trust, to his or her issue, if there be any then living, *per stirpes*, and if none should then be living, then to his or her surviving brother or sister; and if neither should then be liv-

ing, then to the personal representative of the testatrix, Eliza C. Henderson. The costs to be paid out of the trust fund.

There being no error in the decree of the Circuit Court, said decree should be affirmed.

Decree affirmed.

PATTERSON vs. WILSON.

[64 Maryland, 198.]

THE EXECUTION OF A POWER.

The donee of a power may execute it without referring to it, and without taking any notice of it, provided the intention to execute it really appears.

If there is no express reference to the instrument creating the power, there should be some special reference to the subject on which it is to operate, or some circumstance leading to the conclusion that its execution was intended.

APPEAL from the Circuit Court of Baltimore city. The case is stated in the opinion of the court. The cause was submitted to Chief Justice Alvey, JJ. Yellott, Stone, Miller, Irving, Ritchie, and Bryan.

W. Hall Harris and *E. Calvin Williams*, for appellants.

Wm. H. Brune, Jr., for surviving trustees.

Richard F. Kimball, for James Wilson Patterson and others, individually.

YELLOTT, J. The bill of complaint in this cause was filed in the Circuit Court of Baltimore city by the appellees, who are the surviving trustees under the last wills and testaments of James Wilson, deceased, and of Mary Wilson, deceased, who were husband and wife. The said James departed this life in 1851, and his widow in 1869, each having made and executed a testamentary disposition of property. These proceedings were instituted by the trustees for the purpose of obtaining

directions from the court in relation to the transfer of certain property and estate left by said decedents to their daughter, Mary L. Patterson, and for a judicial construction of certain clauses in the last will and testament of said Mary L. Patterson; the trustees holding the said property in trust for the said Mary L. Patterson during her life, and in the event of her intestacy, then in trust for her issue in conformity with the following clause in the will of said James Wilson, and a similar provision in the will of said Mary Wilson. The clause in the will of the said James now referred to, reads as follows :

“ It is my will and desire that each of my said children, including my daughters, whether single or married, shall have power by last will and testament, or instrument of writing in the nature of a last will and testament, whether the same shall be made in my lifetime or after my decease, and although such child may die before me, to dispose of absolutely or in any manner he or she may think proper, all the property, real, personal, or mixed, bequeathed or devised immediately or by way of remainder, to or in trust for him or her by this my will, or which may come or pass to him or her under or by virtue of any of the clauses or provisions of this my will, and such property shall pass and be distributed in all respects according to the will, or instrument in the nature of a will, of such child. None of my said daughters are to have the power of disposing of the property left in trust for them respectively, except by will as aforesaid.”

In the will of Mary Wilson certain property is devised and bequeathed to the said Mary L. Patterson with the same limitations and powers.

By the last wills and testaments of her said parents, it is also provided that if the said Mary L. Patterson should die intestate as to the property left in trust for her, the share or shares of such of her issue as may be under the disability of infancy shall remain and continue in trust until the son or sons shall arrive at the age of twenty-one years, and the daughter or daughters at the age of eighteen, at which time their respective shares shall be payable, and the trust shall cease and close as to them respectively.

On the 12th day of August, 1884, the said Mary L. Patterson departed this life, leaving a last will and testament and children and grandchildren, one of her children having died, leaving an infant surviving her, the said Mary L. Patterson. All the children and grandchildren are parties to these proceedings.

In the bill of complaint it is distinctly and explicitly averred that the said Mary L. Patterson, at the time of her death, had, besides that held in trust for her as aforesaid, other property, both real and personal, which she held in her own right, absolutely and in fee simple; and there has been no adduction of proof tending to show that there was no other property upon which her will could operate except that subject to the power created by the wills of James and Mary Wilson. The said Mary L. Patterson, in her last will and testament, duly admitted to probate, after certain specific bequests of articles of personal property, describes all the other property thus disposed of as "all the rest, residue, and remainder of my estate, real, personal, and mixed, wheresoever situated, and to which I am in any manner whatsoever entitled."

In the court below it was decided that as the will of Mary L. Patterson did not, either in express terms or by necessary implication, indicate an intention to execute the power created by the wills of James and Mary Wilson, the property held in trust as aforesaid must be held and distributed in conformity with the provisions contained in their wills, to which reference has already been made. Whether there was a sufficient indication of an intent to execute the power created as aforesaid, is therefore the sole question presented for determination by this appeal. Upon an inspection of the will of Mary L. Patterson, it at once becomes apparent that there is not the slightest reference made to the power created by the wills antecedently executed by her parents. It has, however, been decided that the donee of a power may execute it without referring to it, and without taking any notice of it, provided the intention to execute the power really appears. (*Smith v. Adkins*, 41 L. J. Chan. 628; *Doe dem. Smith v. Bird*, 5 B. & Ad. 695; *Sugden on Powers*, 373.)

But a person taking under the execution of a power does not derive his title from the donee, but from the donor, under the authority of the instrument creating the power. (*Bradish v. Gibbs*, 3 John C. R. 523.)

If, therefore, there is no express reference to the instrument creating the power, it is apparent that there should be some special reference to the subject on which it is to operate, or some circumstance leading to the conclusion that its execution was intended. Thus, in *Doe dem. Caldecott v. Johnson* (7 Man. & Gran. 1047), where it appeared that a testator, holding property for life with a power to devise or convey, had in general terms devised and bequeathed all his real and personal estates, it was held that the will was not a good execution of the power, because it contained no reference to the power, or to the property on which it was to operate, or to anything from which it could be inferred that the testator in framing the will had the power in his contemplation. And there being no evidence adduced by either party at the trial as to whether the testator had or had not any other real estate upon which his devise could operate, it was further held that the *onus probandi* rested upon him who claimed under the will as an effective execution of the power; and that it lay upon him to establish the negative proposition that the testator possessed no such property.

It has long been the settled doctrine in England that where the power is not referred to, the property subject to its operation must be mentioned, so as to indicate that the disposition was intended to affect it; or, in other words, the donee must do such an act as to show that he has in view the thing of which he has the power to dispose. When this question has arisen in the construction of wills, it seems to have been firmly settled that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject, or to the power itself, or unless an intent to execute it becomes apparent from circumstances tending to such a conclusion. (*Lowson v. Lowson*, 3 Bro. C. C. 272; *Moulton v. Hutchinson*, 1 Atk. 558; *Hales v. Morganum*, 3 Ves. Jr. 299.)

In 3 Ves. Jr. 301, Lord Alvanley distinctly stated the true rule to be that "in the execution of a power there must be a direct reference to it, or a clear reference to the subject, or something upon the face of the will, or, independent of it, some circumstances which show that the testator could not have made that disposition without having intended to comprehend the subject of the power."

In recognition of this doctrine, Chancellor Kent says that "in the case of wills it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest." (4 *Kent Comm.* marg. 334.)

This court has recognized and adopted the rule as settled in England, and as so clearly and concisely stated by the eminent jurist just mentioned. (*Morey, Executrix of Michael v. Michael*, 18 Md. 241; *Md. Mut. Benev. Society of Red Men v. Clendinen*, *Admr. &c.* 44 Md. 429; *Foos v. Scarf et al.* 55 Md. 309.)

In the case in 55 Md., it is said that "the intention to execute the power must appear by a reference in the instrument to the power, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power."

In the will of Mary L. Patterson there is no reference to the power, nor to the subject on which it was to operate; and as it is averred in the bill of complaint, and nowhere denied, that she had other property, her will would not be inoperative without the aid of the power. There was, therefore, no error in the ruling of the Circuit Court, and its decree should be affirmed. But as the appellants desired and invoked a judicial construction of the will in question, the costs should be paid out of the funds in their hands as trustees.

Decree affirmed.

BUCHANAN *vs.* LLOYD.

[64 Maryland, 306.]

CONSTRUCTION OF A WILL.—CODICIL.—ADDED LEGACY.

By the sixth clause of his will, made in 1829, a testator devised and bequeathed to his three sons, Edward, James, and Daniel, and the survivors or survivor of them, and the heirs, &c., of the survivor, *for and during the life* of his daughter, Elizabeth Tayloe Winder, "and no longer," his farm in Talbot county, called Knightly, and also the sum of \$5,000, in special trust and confidence, that they should collect and receive the profits and interest thereof, and pay the same over to her, for her sole use and benefit, during her natural life, whose receipts in writing therefor should be a sufficient discharge to the said trustees, her coverture notwithstanding; *and from and after her death*, he devised and bequeathed the said farm and money before given in trust for the benefit of his said daughter, directly, and not in trust, to her child or children, if any, their heirs, &c., equally to be divided between them, share and share alike. By a codicil made in 1834, the testator bequeathed to his two sons, Edward and James, "in special trust *agreeably with the provisions of my said will*, the sum of \$5,000 (in addition to the \$5,000 devised in my said will), also all the servants or slaves and other articles held by me under a bill of sale from Edward S. Winder, and all servants or slaves of mine which may be in the service or possession of the said Edward S. Winder, or living on the farm called Knightly, at the time of my death, for the use and benefit of my daughter, Elizabeth Tayloe Winder." *Held*:

That the additional bequest of \$5,000, and of the proceeds of the sale of the slaves mentioned in the codicil, was for the life of Mrs. Winder only, without remainder to her children, and passed at her death to the three sons of the testator, under the residuary clause of his will.

Whenever it is rendered necessary or proper, for determining the rights of parties, that the opinion of the court should be taken as to the proper construction of a will, and the necessity for such resort has been occasioned by the doubtful or ambiguous terms employed by the testator, it is proper to award the costs against the residuary fund of the estate.

APPEAL from the Circuit Court for Talbot county, in equity.

This appeal was taken from a *pro forma* order of the Circuit Court, sitting in equity, passed on the 30th of May, 1885, in accordance with an agreement of counsel, sustaining the exceptions filed by the appellee to "Account A, No. 1," and rejecting the said account, and overruling the exceptions filed by the appellants to "Account C, No. 3," and ratifying said

account. To Account A, No. 1, the appellee objected, because he was therein charged with the sum of five thousand dollars under the codicil to the will of Governor Lloyd, and with the sum of two thousand one hundred and seventeen dollars and forty-seven cents, the value of servants and slaves mentioned in said codicil, aggregating the sum of seven thousand one hundred and seventeen dollars and forty-seven cents, which were improperly distributed, with other moneys, to the children of Elizabeth Tayloe Winder. To Account C, No. 3, the appellants objected, because the trustee was not charged therein with the sums of five thousand dollars and two thousand one hundred and seventeen dollars and forty-seven cents, claimed to be due the children of Elizabeth T. Winder under the codicil to the will of Governor Edward Lloyd. The case is further stated in the opinion of the court.

The cause was argued before Chief Justice Alvey, JJ. Yellott, Miller, Irving, Ritchie, and Bryan.

John N. Steele and *I. Nevett Steele*, for appellants.

Philip Frank Thomas and *S. Teackle Wallis*, for appellee.

ALVEY, C. J. In this case the only question presented is one of construction, and that is as to the effect of a certain clause in the codicil made to the will of the late Governor Edward Lloyd, of this State.

The will was made in 1829, the codicil in 1834, and the testator died in the last mentioned year, leaving seven children, three sons and four daughters, to whom he devised and bequeathed, after making provision for his widow, a large and valuable estate, both real and personal. To the sons he gave their portions absolutely, but to the daughters their portions he gave in trust.

By the sixth clause of his will the testator devised and bequeathed to his three sons, Edward, James M., and Daniel Lloyd, and the survivors or survivor of them, and the heirs, &c., of the survivor, *for and during the life* of his daughter, Elizabeth Tayloe Winder, "and no longer," his farm in Talbot

county called Knightly, on which she then resided, and also the sum of \$5,000, in special trust and confidence, that they should collect and receive the profits and interest thereof, and pay the same over to her, for her sole use and benefit, during her natural life, whose receipts in writing therefor should be a sufficient discharge to the said trustees, her coverture notwithstanding; *and from and after her death*, he devised and bequeathed the said farm and money, before given in trust for the benefit of his said daughter, directly, and not in trust, to her child or children, if any, their heirs, &c., equally to be divided between them, share and share alike.

The provisions made by the testator in his will for his other daughters were on exactly similar trusts as that in behalf of Mrs. Winder, being for their respective lives only, with limitations over directly to their children. And after various bequests of his personal estate, the testator, by a residuary clause in his will, bequeathed all the residue of his personal estate to his three sons, equally to be divided between them, share and share alike.

By the codicil, the testator, after ratifying and confirming the previous will in all its parts, except so far as the same should be revoked or altered by the codicil, in making various alterations of and additions to the devises and bequests in the will contained, bequeathed to his two sons, Edward and James M. Lloyd, "in special trust, *agreeably with the provisions of my said will*, the sum of \$5,000 (in addition to the \$5,000 devised in my said will), also all the servants or slaves and other articles held by me under a bill of sale from Edward S. Winder, and all servants or slaves of mine which may be in the service or possession of said Edward S. Winder, or living on the farm called Knightly, at the time of my death, for the use and benefit of my daughter, Elizabeth Tayloe Winder."

Mrs. Winder is dead, and the appellants in this case are her children; and their contention is, that the \$5,000, and the proceeds of the sale of the slaves mentioned in the clause of the codicil just quoted, passed to them, upon the death of their mother, in precisely the same manner as did the property devised and bequeathed to them by the will; while on the

part of the appellee it is contended that the additional bequest of money and slaves made to Mrs. Winder by the codicil was for her life only, without remainder to her children, and that, subject to the bequest for the life of Mrs. Winder, such property passed to the three sons of the testator under the residuary clause of the will. Which of these contentions is correct is the only question presented on this appeal.

The terms of the will and its various provisions are plain and explicit enough ; but the codicil was not so skillfully drawn, and is greatly wanting in clear and unambiguous terms to express with clearness and precision the real meaning of the testator. By the will, the devise of the realty, and bequest of the money, to the trustees, were for the life of Mrs. Winder, *and no longer*, with power to collect the profits and interest, and to pay the same over to her during her life. From and after her death the property, both real and money, was devised and bequeathed directly and absolutely to the children, without the intervention of trustees ; the children taking the legal estate, and not, as in the case of the mother, a mere equitable estate in the property devised and bequeathed. From the death of the mother, the trust, in respect to this particular property, terminated, except as to the resulting liability on the part of the trustees to account ; and from that moment the children became entitled to receive the property as legal owners under the will. But by the codicil, the property intended as an additional gift to Mrs. Winder was bequeathed, not jointly to the three sons as trustees, but to two of them only, "in special trust, agreeably with the provisions of my said will ;" that is to say, upon the same trust as that specified in the will, namely, to hold for the life of Mrs. Winder, and no longer ; and to collect and pay over to her the income and profits during her life. No reference whatever is made to the children of Mrs. Winder in this bequest, nor is there any express limitation over of the property bequeathed by the codicil, after the death of Mrs. Winder ; and the question is, whether, upon the will and codicil together, there is any such manifest intention, by implication or otherwise, that the property thus bequeathed by the codicil for the life of Mrs. Winder should

go to her children at her death, as in the preceding devise by the will, and thus withdraw the property from the operation of the residuary clause of the will? Of course, it is very clear that if there be no such limitation over in favor of the children, the property passed under the residuary clause; for it is too obvious to admit of serious question that Mrs. Winder did not take more than an equitable life estate in the property given her by this particular clause of the codicil.

It is certainly a well settled principle that the will and codicil are to be construed together as one instrument, and are to be reconciled as far as practicable. But what is plainly given by the will is not to be revoked or withdrawn by doubtful or ambiguous expressions employed in the codicil. Here the effort is, by construction, and in total absence of plain words, expressive of any such intention to give an effect and operation to a clause in the codicil whereby the residuary clause of the will must be curtailed of the subject-matter of its operation. As said by Sir Wm. Grant in *Holder v. Howell* (8 Ves. 97), when considering a question somewhat of an analogous character to the present, we may have a very strong conjecture as to the objects and purposes of the testator in making the bequest in question, and as to what he may have supposed to be its effect and operation; but the question is, whether, upon that conjecture, we can supply, with any degree of certainty, the limitation over to the children of Mrs. Winder, such as we find expressed in the devise contained in the will? We have carefully considered the various provisions of both will and codicil, so far as they could in any way bear upon the construction of the clause of the codicil in question; and we are constrained to say, as was said by the learned judge in the case just referred to, that whatever conjecture we may have, there are no materials in the codicil, or in the will and codicil together, of which we can predicate a limitation over to the children of Mrs. Winder. The terms "agreeably with the provisions of my said will," following the words "in special trust," have reference exclusively to the trust and the manner of its execution by the trustees, as declared and prescribed in the clause of the will, and not to any separate bequest over of

the legal estate. Without this reference to the will, neither the duration nor the terms of the trust would have been declared by the clause in the codicil, and it might, in such state of case, have been plausibly contended that Mrs. Winder would take under that clause the entire equitable estate in the money and slaves bequeathed, and not a mere life estate. That, however, was not what the testator intended by this clause of the codicil. It is quite true, as a general principle of construction, that *added* legacies are subject to the same conditions and restrictions as the legacies to which they are added; but that general principle can have no application to this case in support of the contention that the additional bequest in the codicil should be taken with the same limitation over to the children, as that expressed in the clause of the will referred to. In the case of *Mann v. Fuller* (Kay, 624, 626), it was said by Vice-Chancellor Wood, adopting a principle of construction enunciated by Lord Justice Turner, in the case of *More's Trust* (10 Hare, 171), that the cases upon this subject have not gone further than this: "That where the subject of the first gift is given absolutely to the party or is made defeasible, the second or additional gift has been held to be given upon similar terms; for example, if the former gift were absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so, if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same condition. "But in no case," says the Vice-Chancellor, "has it been held that the latter gift is to go to the parties entitled under the *subsequent limitations* of the former gift." And so appears to be the whole current of decisions upon the subject of the construction of *additional* bequests, whether such additional bequests be given by will or codicil in the absence of express limitation over. We must therefore affirm the order appealed from, and remand the cause.

Order affirmed, and cause remanded.

This court having directed by its order accompanying the foregoing opinion, that the costs should "be paid out of the fund," a petition was filed by the appellants, on the refusal of

the appellee to pay their costs, asking the court to declare whether or not it meant by said order that the costs should be paid out of the fund of \$7,117.47—the fund in controversy—in the hands of the appellee. On said petition Chief Judge Alvey delivered the opinion of the court as follows :

By the decree of this court the cost was adjudged to be paid out of the fund. There is now a question raised as to what fund is to bear this cost, all the funds of the estate, except that in controversy, having been paid out to the parties entitled thereto. In directing the cost to be paid *out of the fund*, the fund intended to be charged was that in controversy, and none other; that fund being the only one, by the appeal, that was made subject to the decree of this court.

The appeal was of an amicable nature, having been taken from a *pro forma* order of the court below, entered by agreement of the parties. The cause of contention, as will appear by the opinion of the court heretofore filed, was the question as to what was the proper legal construction of a clause in the codicil to the will of the testator, and there was at least color for the contention of the appellants; and such being the case, it was deemed proper by the respective parties that the case should at once be brought to this court for final determination. The appellants failing in their contention, the fund was declared to have passed under the residuary clause of the will. Under the circumstances of this case, the rule in regard to cost would seem to be well established. That rule is, that whenever it is rendered necessary or proper, for determining the rights of parties, that the opinion of the court should be taken as to the proper construction of the will, and the necessity for such resort has been occasioned by the doubtful or ambiguous terms employed by the testator, it is proper to award the cost against the residuary fund of the estate. (*Wilson v. Brownsmith*, 9 Ves. 180; *Ripley v. Moysey*, 1 Keen, 578; *Jolliffe v. East*, 3 Bro. C. C. 25.) And it was in view of the ambiguous nature of the clause of the codicil involved in this case that the cost was awarded to be paid out of the fund.

IN THE MATTER OF THE ESTATE OF SKERRETT.

[67 California, 585.]

WILL IN THE FORM OF A DEED OF GIFT.—CERTAIN INSTRUMENTS CONSTRUED TO BE A WILL.

An instrument purporting to be a deed of gift, but inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will.

Two instruments in the handwriting of the deceased, attached together, and found among his papers, one being in the form of a letter signed by him and addressed to his sister, and the other purporting to be a copy of a deed of gift from the former to the latter, and it appearing on the face of the letter that the property described in the deed was intended by the deceased as a provision for the sister after his death, held, to be a will, and admissible to probate.

APPEAL from certain orders of the Superior Court of the city and county of San Francisco.

A. H. Loughborough, for proponent.

Joseph Hutchinson, Winans & Belknap, Lloyd & Wood, P. G. Murphy, and *M. C. Hassett*, for contestants.

MYRICK, J. These appeals will be considered together. No. 9560 is an appeal from an order refusing to admit an instrument to probate as the will of the deceased; and No. 9735 is an appeal from an order admitting an instrument to probate.

The following appears in the bill of exceptions in appeal No. 9560 :

"Be it remembered that on the 13th day of September, 1883, there was filed with the clerk of said Superior Court a certain instrument in writing, which was in words and figures following, to wit :

"This indenture, made this twenty-sixth day of April, one thousand eight hundred and eighty-one, between Nicholas Skerrett, of the city and county of San Francisco, State of California, party of the first part, and Anna J. Skerrett, his sister, of London, England, party of the second part :

“Witnesseth: That the said party of the first part, in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, does by these presents give, grant, and confirm unto the said party of the second part, and to her heirs and assigns forever, that certain lot [here follows description of real estate], together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainder, and remainders, rents, issues, and profits thereof, to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to her heirs and assigns forever.

“In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

“MY DEAR ANNA—I have for a long time been thinking of executing this document. We all know life is uncertain, and we don’t know the moment we may be called away. Both you and myself may live for many years to come, yet we know not the time. I therefore want you to know you are provided for under any circumstances. Now, I want to explain the particulars: This deed which I send you a copy of is all regularly made out and witnessed before a notary public. Nothing else necessary but to have it recorded; then it becomes your property, which can be done any moment, if necessary. My intention, however, is to provide for you while I live, the same as I always have done; and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live. I must now conclude, having no more to say, and am joined by Mr. Dixon in wishing you health and happiness. Your affectionate bro.,

“N. SKERRETT.”

A witness testified as follows:

“After Mr. Skerrett’s death, myself and Capt. Lees examined his box, in which his deed and other valuable papers were consigned, to discover whether there was any other will than

the one produced here. I did not see anything that had reference to that except that, and I found no paper purporting to be a will. I found in the drawer of his desk an envelope addressed to his sister Anna, containing a letter and copy of deed to her. I found in the tin box before mentioned, in the lower part of the same desk, a deed from him to her acknowledged before a notary. This deed was in an envelope, indorsed in the handwriting of Nicholas Skerrett, 'Deed of Gift, Nicholas Skerrett to Anna Skerrett.' Neither of these envelopes was sealed. [The witness is here shown the said instrument which was filed herein for probate, as aforesaid.] This is the paper which I found in the drawer of Mr. Skerrett's desk, inclosed in an envelope, addressed to his sister Anna. I have often seen him write, and I know his handwriting. The whole of this instrument is in the handwriting of Nicholas Skerrett, and it is his signature subscribed at the end. The address on the envelope was also written by him."

It was also in evidence that the sister referred to, Anna J., was in indigent circumstances, and that the deceased had made remittances to her for her support. The deed of gift which was referred to was executed (except as to delivery) and was acknowledged. It was not delivered, but was found in a box of the deceased. A witness testified that he suggested to the deceased that he should send the deed to the sister, to which deceased replied: "Well, you know she will have it, and you know she will have abundance."

The court found that the instrument (copy of deed and letter) was entirely written and signed by the hand of the deceased; that it was not dated, and was not a will; therefore, the court refused its probate.

In the case presented in the appeal No. 9735, the deed itself, acknowledged as a deed and witnessed (not the copy and letter), was offered for probate. The court found its execution by the deceased, in the presence of the two witnesses; that he declared the same to them to be his will; that they signed the same in his presence and at his request; and admitted the same to probate.

We are of opinion that the order in each case was erro-

neous. The deed (proposed in No. 9735) was a deed of gift, and contained no words of testamentary character. It was invalid as a deed, because not delivered; it was not a will, because it expressed no design to be other than a deed. The evidence was insufficient to show its execution as a will; it was not olographic, and the evidence was insufficient to show that the deceased declared to the witnesses that the paper was his will. The instrument proposed in No. 9560, taken as an entirety, should have been admitted. It was written entirely by the hand of the deceased, it was signed by him, and a date appears at the commencement. Neither the copy of the deed nor the letter, taken by itself, constitute a will; the one is not testamentary in its character, the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character. We think the following words clearly show an *animus testandi*, viz.: "We all know life is uncertain, and we don't know the moment we may be called away. . . . I therefore want you to know you are provided for under any circumstances. . . . My intention is to provide for you while I live, the same as I have always done; and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live."

Doubtless the deceased had it in his mind, when he executed the deed, to send it to his sister at some time, thus vesting the title in her in his lifetime; but for some reason he retained it, perhaps so that he could sell the property if he should desire; but that he intended she should have the property upon his death, if not sold by him, is to us very clear. Such being the case, and the instrument being executed with the formalities required by law, it is entitled to be admitted to probate.

The orders and motions in both appeals are reversed, and the matters are remanded with directions to the court below to refuse probate of the deed by itself, and to admit to probate the copy of deed and letter, being the instrument referred to as proposed in appeal No. 9560.

MORRISON, C. J., MCKEE, THORNTON, and MCKINSTREY, JJ., concurred.

Rehearing denied.

What Instruments are held to be a Will.—Whether or not a given instrument in writing shall be held to be a will, is essentially a question of intent. It is a general rule that, in order to constitute an instrument a will, the maker must, at the time of executing it, have intended it to operate as a will. *Swett v. Boardman*, 1 Mass. 257; *Campbell v. Logan*, 3 Bradf. 90; *Lyles v. Lyles*, 2 Nott & McC. 531; *Succession of Hampton Elliot*, 27 La. Ann. 42; *McBride v. McBride*, 26 Gratt. 476; *Booster v. Rogers*, 9 Gill, 44.

Accordingly, parol evidence is admissible to prove that an instrument, not on its face testamentary in character, is, in fact, a will.

Thus, in *Clarke v. Ransom*, 50 Cal. 595, the court admitted to probate, as being testamentary in its character, the following writing: "Dear Old Nance—I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon."

So, also, the following: "It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. David Outlaw. Dec. 20th, 1848." *Outlaw v. Hurdle et al.*, 1 Jones L. (N. C.) 150.

In a Louisiana case, these words were held to be a will: "New Orleans, September 15, 1859. Mrs. Sophie Loper is my heiress. G. Ehrenberg." "New Orleans, March 16, 1861. The legatee's name is correctly spelt Loeper. G. Ehrenberg." *Succession of Ehrenberg*, 21 La. Ann. 280.

A Deed.—An instrument in the form of a deed, which purports to convey an undivided interest in the property of which the grantor shall die seized, has been held to be a will. *Watkins v. Dean*, 10 Yerger (Tenn.), 320; *Walls v. Ward*, 2 Swan, 654.

But where the instrument conveys an estate in specific property, which the grantor then owns, to take effect at his death, it is a deed and not a will. *Swails v. Bushart*, 2 Head, 561.

And in *Golding v. Golding's Admr.* 24 Ala. 122, an instrument conveying property by the words, "at my death I do hereby give and grant unto my son," delivered on the day of its date, was held a deed.

An instrument containing all the terms of a deed is not rendered testamentary by a clause that the maker and his wife "are to have the use, benefit, and control of said land for and during our natural lives." *Bass v. Bass*, 52 Ga. 581.

In the leading case of *Habergham v. Vincent*, 2 Ves. Jr. 221, it is laid down that any instrument, whether deed-poll or indenture, which is obviously intended not to take effect until after the maker's death, will operate

as a will. See, also, *Cross v. Cross*, 55 Eng. Com. Law, 714; *Rehn v. Coles*, 2 P. & D. 362.

This is the rule in Maryland, where certain bonds for the payment of money by the maker were held to be testamentary. *Carey v. Dennis*, 13 Md. 17. The court, in this case, said that "when an instrument does not operate *inter vivos*, but is made to depend for its whole operation upon the death of the maker to consummate it, then it can only take effect as testamentary."

So, in *Turner v. Scott*, 51 Pa. St. 126, where the instrument was a warranty deed, the conveyance not to take effect until the grantor's decease, it was held to be testamentary.

And in Missouri, an instrument granting, conveying, and assigning "on and after the day of my death to A. the following tract of land," is a will. *Miller v. Hoyt*, 68 Mo. 584.

In *Kinard v. Kinard*, 1 Speer Eq. 256, a deed of slaves "after my death," was held testamentary.

So a deed of slaves "at my death," reserving control during life, was held to operate as a will. *Ragsdale v. Booker*, cited 2 Bail. 590.

An Assignment.—An assignment is often held to be a will, as where a father transferred certain shares of stock to his children, the transfer to take effect immediately on his death. *Arnold et al. v. Arnold et al.*, 62 Ga. 627.

So, also, the following: "I, Conrad Schad, assign . . . four thousand dollars to my wife, Margaret Schad, after my death, when she can do with it according to her best will. Conrad Schad," was considered testamentary. *Schad's Appeal*, 88 Pa. St. 111.

A Note.—An indorsement upon a note, "I give this note to A.," may be proved as testamentary. *Dictum* in *Chaworth v. Beech*, 4 Ves. Jr. 555. In this case the deceased left a will bequeathing the note to A., but the court said the indorsement would have been sufficient.

Where the payee of a note wrote upon the back, "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and, having signed it, died before the note was paid, it was held that the indorsement was testamentary, and entitled to probate as a will. *Hunt v. Hunt*, 4 N. H. 484.

But where a note was given to W., payable on demand, parol evidence was not admitted to show that it had been agreed that the note should not be paid until after the death of the maker. *Woodbridge v. Spooner*, 3 B. & A. 238.

So, also, an instrument in the form of a note, "payable after my decease on demand," is a note. *Bristol v. Warner*, 19 Conn. 7.

A Check.—In an English case, three checks given to the legatee under a will, "for fear anything should happen to me that I should die," were held to be codicils. *Bartholomew v. Henley*, 3 Phillim. 317.

A Power of Attorney.—Where a paper, in form a power of attorney, properly attested, authorized two persons named therein to administer on the party's estate, the court held it to be a good will. *Rose v. Quick*, 30 Penn. St. 225.

So the following paper, executed by two sisters, was construed to be testamentary: "Know all men, that we, Jincey and Patsey, do 'covenant and agree' that, for the love we bear to each other, whichever of us may be the longest lived, shall be the heir of the other." *Evans v. Smith*, 28 Ga. 98.

A Memorandum.—An informal, unsigned memorandum of legacies and devises may be made a will by act of God happening before the scrivener has completed the formal will from the memorandum. *Booster v. Rogers*, 9 Gill, 44.

Although some of the provisions of an instrument may have had the force of a contract, and may have become operative during the life of the testatrix, the remaining provisions are not thereby deprived of testamentary character, nor the instrument rendered inadmissible to probate. *Taylor v. Kelly*, 31 Ala. 59.

WILLIAMS *vs.* NICHOL.

[47 Arkansas, 254.]

LEX REI SITUS.—LEGACY CHARGED UPON LANDS.—TRUSTEES.

The law of the *situs* of immovable property governs exclusively as to all rights, interests, and title in and to the property, and as to the capacity or incapacity of a testator, and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner of its disposal for the payment of debts.

Courts of equity in the State in which lands are situated have exclusive jurisdiction as to legacies charged upon them. The acceptance of a devise of land renders the devisee personally liable for a legacy charged upon the land. Courts of equity have power to remove trustees for neglect or breach of duty, but will not remove them for every mistake or neglect of duty, but for such only as endanger the trust property, or show a want of honesty or capacity to execute their duties, or a want of reasonable fidelity. A trustee appointed by a testator will not be removed for insolvency, nor required to give bond, when the testator has not required a bond and the bill does not show that he is less solvent than when he was appointed.

APPEAL from a decree of the Jefferson Circuit Court in Chancery.

Sol. F. Clark, Samuel W. Williams, and Met. L. Jones,
for appellants.

U. M. & G. B. Rose, and N. T. White, for appellees.

BATTLE, J. Willoughby Williams died, at his late residence in the State of Tennessee, on the 8th day of December, 1882, leaving a last will and testament, which was duly admitted to probate, in the State of Tennessee, and in the county of Jefferson, in this State. He devised by his will to his son, McH. Williams, his plantation in Jefferson county, Arkansas, known as the "Bankhead Place," and charged it with legacies to his children and grandchildren, as follows: He directed McH. Williams to pay to his son John H. Williams, as trustee for his daughter Nannie W. Nichol (the plaintiff), wife of C. A. Nichol, the sum of \$12,000, in four annual instalments, from the date of the testator's death, with six per cent. interest on the same from that date; and the said John H. Williams was appointed trustee for the said daughter. Second, to pay to the children of the testator's son, Robert N. Williams, the following sums, to wit: To Jennie Williams, \$1,000; to Morgan Williams, \$1,000; and to the two younger children of said Robert, \$2,000 each upon their arriving at twenty-one years of age. Such legacies were to bear interest, from the death of the testator, at six per cent. The will then proceeds:

"I wish my son, John H. Williams, to accept the position of trustee for my daughter, Nannie W. Nichol; to receive the \$12,000 and interest from my son, McH. Williams, and invest it in a home for her when *she and the said John H.* may deem it best for her interest, or to invest the same in some good, well-secured, interest-paying first mortgage bonds; and the said legacy of \$12,000, and whatever property it may be invested in, and all the profits and interest thereon, are to be received by the said John H. Williams, and held for her sole and separate use, and to be absolutely free from all the debts,

contracts, and liabilities of her husband, C. A. Nichol, or any future husband she may hereafter have; the said interest and profits to be paid to her for that purpose by my son, John H. Williams, as received by him."

In another clause of the will the testator bequeathed 30,000 out of 40,000 shares which he held of the stock of the Memphis & Hopefield Real Estate Company, and directed it to be divided by his executors between his daughters, Mary Jane McNairy, Ellen W. Lewis, and Nannie W. Nichol (the plaintiff), share and share alike. The portion given to plaintiff, or the proceeds of any sale thereof, to be held by said John H. Williams, as her trustee, in the same manner and with the *same power of disposition* as directed in regard to the legacy of the \$12,000; and in still another, the seventh clause, he devises his Memphis and Fort Pickering property, and *any residuum of property of which* he might die seized, to be sold by his executors, and the proceeds, after paying debts, to be equally divided between his children, and the share going to the plaintiff he directs to be held in trust by the said trustee, John H. Williams, in the same manner as the other bequests to her.

John H. Williams and MacH. Williams were nominated executors of the will, and after the death of the testator qualified as such.

Mrs. Nannie W. Nichol commenced this action, in the Jefferson Circuit Court, against John H. and MacH. Williams, as executors, and in their own rights, and the other legatees and devisees named in the will. After setting out the foregoing facts in her complaint, she alleges that the property mentioned in the seventh clause of the will has been sold as directed, *the debts all paid*, and each of the legatees mentioned in the seventh clause of the will have been paid their share of such proceeds, but that no part of the proceeds have been paid to the plaintiff, nor has she received anything on account of any bequest of the will; said John H. Williams declaring that nothing, by the terms of the will, is to be paid to her, but that all the moneys that came to his hands, as trustee under said will, are to be held by him for re-investment, and that he is no

authorized to pay to the plaintiff the interest accruing on the fund set apart in said will for her use and benefit.

She alleges that said trustee has never taken any steps to collect any part of said money, except by the sale of the property mentioned in the seventh item. That he has utterly neglected to take any steps towards carrying out the trusts devolved upon him, though often requested to do so, and that he has been acting as such trustee, and received money as such, without having given bond or other security; and that he is wholly insolvent.

She prays that the will may be construed; that all its trusts for the benefit of the plaintiff may be enforced against said land and other property, and against the trustee and the executors; and that if the court should be of opinion that any investment should be needed for the benefit of the plaintiff, under the provisions of the will, *the court may proceed to have the same made under its own order and direction for the protection of the plaintiff.* That the court may cause the *interest* and the *increase* that may be due to the *plaintiff* under the will to be paid to her. That an account might be taken of whatever money or property she was entitled to under the will, and that all of her rights thereunder might be accurately settled and defined. That said trustee, Williams, might be removed, and another trustee appointed to act in his stead.

The defendant, John H. Williams, in his own right, demurred to the complaint because the court did not have jurisdiction, and because it did not state facts sufficient to constitute a cause of action; which was overruled.

McH. Williams, in his own right and as executor, filed an answer. He admits the will and its probate, as alleged. Says, in substance, that he was one of the executors appointed under the will and a beneficiary; that he is advised that the estate or interest going to the plaintiff under the will was given to the defendant, John H. Williams, in trust, to be collected and invested for her by defendant as trustee; and that there was no estate cast upon her by the will, except through the intervention of such trustee, and in the manner set out in the will, and that there is no power to set aside or adjust the will so as to

avoid the terms and limitations of it as a devise. Defendant also says that two years had not elapsed after the death of the testator to the commencement of this suit, and he is advised that two years, under the laws of Tennessee, must elapse before suit can be brought to cause the executors to account. Alleges that the claimant in the present case is a non-resident of Tennessee, and that there are other resident claimants against the estate, to wit, Logan H. Roots and others, and they are entitled to five years to settle and adjust their claims before any equitable proceedings, except in the Probate Court of Tennessee, can be tried. Says that Lehman, Abraham & Co., of New Orleans, has a claim of \$7,000 which has been duly presented and refused, and suit upon the same in the courts at Nashville, Tennessee, is now pending, and which can not be adjusted or settled for the present. Says that the Hopefield stock at Memphis, mentioned in the will, has not been, and cannot now be disposed of, but still exists as part of the trust, and the courts of Tennessee, at Nashville, are the proper courts to settle all the questions mentioned or shown in this action. That application upon all claims or legacies should be first made to the *forum* of the domicile. That there are other legacies charged on the lands mentioned in this suit in favor of the minor children of Robert N. Williams and his widow and heirs. That he should be protected, and the trust estate so adjusted as to protect them and himself. That he brings into court all sums due plaintiff, and asks the protection of the court.

Afterwards MacH. Williams filed a supplemental answer, in which he, in substance, states :

That since his former and original answer he has paid to John H. Williams, the trustee named in the will, as declared in the pleadings in this case, not being restrained by the court, the money charged against the Bankhead plantation in favor of the complainant, and taken his receipt therefor, and he is informed and believes that the said John H. Williams, the trustee, has proceeded in strict and apt compliance with the said trust in him so reposed by the will, to invest the fund so paid in good, well-secured, interest-paying first mortgage

bonds, solvent, and in such form as to avoid any litigation, by lending the money to C. M. Neel, of Jefferson county, Arkansas, at eight per cent. per annum, payable semi-annually, and by taking for the purpose of securing the same a first mortgage, in favor of M. L. Bell, as trustee, on Lake Dick plantation, which is worth more than thirty thousand dollars in cash, and that in this payment and said instrument nothing has been done or suffered to impair the said funds, and that by this the said Bankhead plantation is absolved of said lien ; but sure as he is of this, that he is willing, notwithstanding, to let a future decree be made, holding the Bankhead plantation as a guaranty of the correctness of the instrument, and its collection, if it should be finally ascertained by judicial investigation that the investment was not a judicious one.

To this supplemental answer the plaintiff filed a demurrer, which was sustained. As the defendants did not plead further, a final decree was rendered in favor of plaintiff, declaring that the bequest of \$12,000, with six per cent. interest from December 8, 1882, was a charge on the Bankhead place, and removing John H. Williams from his position as trustee for the plaintiff and appointing another in his place. The defendant, MacH. Williams, was directed to pay into court, for the separate use of the plaintiff, within thirty days, six thousand dollars and interest, so much of the \$12,000 and interest as was then due, and the remaining installments as they should severally fall due. Reference was made to a master to ascertain the best manner of investing the money, with authority to examine the plaintiff on the subject, separate from her husband. If the master should be of the opinion that the money should be invested in a home for the plaintiff, he was directed to report his opinion as to the best property to be purchased for that purpose, and the state of the title thereto. If the money should not be paid as required, it was ordered that the Bankhead place be sold. It was decreed that such sale should be made subject to the lien of the installments of the \$12,000 not due, and to all other trusts and charges imposed on the place by the terms of the will, which were expressly excluded from the operation of the decree.

John H. Williams and McH. Williams, as executors and in their own rights, have appealed to this court.

The first question presented for consideration is, did the court below have jurisdiction of the subject of this action? Appellants insist it did not.

It is a well settled principle of law that the law of the *situs* governs exclusively in regard to all rights, interests, and titles, in and to immovable property. It governs as to the capacity or incapacity of a testator and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner in which it shall be disposed of for the payment of debts. No court, State or Federal, can reach or confer title, or sell, under decree, lands situate in a State in which it does not sit. Every attempt of a court to found jurisdiction over such lands must, from the very nature of the case, be utterly nugatory. In regard to legacies charged upon lands, the courts of equity in the State in which the land lies have exclusive jurisdiction. (*Clopton v. Booker*, 27 Ark. 482; Story Eq. Jur., § 602; Story on Conflict of Laws, §§ 424, 463, 474, 483, 550, 555.)

In this case the legacy in question was made a charge upon the lands of the deceased in this State, which were devised to McH. Williams. A lien was expressly retained by the will upon these lands as a security for the payment of this legacy. The will directed and made it the duty of McH. Williams, and not the executors, to pay it. By accepting the devise to him of the lands designated in the will as the Bankhead place, McH. Williams became personally bound to pay it.

Mr. Justice Earl, in delivering the opinion of the court in *Brown v. Knapp* (79 N. Y. 143), said: "It is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate. (2 Redf. on Wills, 209; *Mensch v. Mensch*, 3 Lans. 235; *McLachlan v. McLachlan*, 9 Paige, 534; *Wood v. Wood*, 26 Barb. 356; *Dodge v. Manning*, 1 N. Y. 298; *Reynolds v. Reynolds*, 16 Id. 257; *Gridley v. Gridley*, 24 Id. 130; *Harris v. Fly*, 7 Paige, 421; *Olmstead*

v. *Brush*, 27 Conn. 530.) If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay. Here, William S. Brown, the executor, was directed to pay this legacy, and he was the devisee of the real estate; and hence the land not only was charged with the legacy, but the devisee became personally liable to pay it—principal as well as interest.

“The payment of such a legacy can be enforced by a suit in equity against the real estate, or by a common law action directly against the devisee upon the implied promise to pay it—a promise implied by his acceptance of the devise.”

McH. Williams accepted the devise to him of the Bankhead place. He offered to bring into court the money due on the \$12,000 legacy, and invoked the protection of the court. As said by Chancellor Kent in *Glen v. Fisher* (6 Johns. Ch. 34, 36): He “has no right to require security to refund before payment of the legacy, for he does not pay the legacy in a representative character. The devise was given to him on condition of paying such a legacy to the plaintiff, and if he accepts of the devise he takes it *cum onere*. This is the case of a devise creating a charge on *the person* of the devisee, in case of his acceptance of the gift, according to the distinction noticed in the case of *Jackson v. Bull*, 10 Johns. Rep. 148. He did accept the devise, and he became thereby absolutely and personally bound to pay the legacy. He has no right to create any condition precedent to the payment, and the law makes none. He who accepts a benefit under a will must conform to all its provisions, and renounce every right inconsistent with them. This is an obvious and settled principle in equity. He accepts the devise under the condition of conforming to the will, and a court of equity will compel him to perform the condition, “for no man,” says Chief Baron Eyre (*Blake v. Bunberry*, 1 Vesey Jr. 523), “shall be allowed to disappoint a will under which he takes a benefit.”

But it is said that the executors cannot be held to account or settlement, or controlled, by any of the courts of this State, and, therefore, the court below did not have jurisdiction. There was no effort made by the court below to hold the executors to an account and settlement, or to fix the extent of their liability as such, or to control them in any manner. The decree is wholly confined to the enforcement of the payment of the legacy of \$12,000, and the trust created by the will in connection therewith. This legacy was not made payable by the executors, but by McH. Williams, in his individual capacity. It was not made payable to the executors, but to John H. Williams, as trustee, the trust not being annexed to his office of executor. It was not to be paid out of the Tennessee assets, but it was made a charge on lands in this State. This being true, the fact that John H. and McH. Williams were also executors could not defeat the jurisdiction of the court. (*Clopton v. Booker, supra*; *Case of Elizabeth Baird*, 1 Watts & Sarg. 288; *Johnson's Appeal*, 9 Barr, 421; 1 Perry on Trusts, § 281.)

Plaintiff insists that John H. Williams should be removed from his trusteeship under the will, so far as relates to the bequest of \$12,000, because he has wholly neglected to take any steps toward the execution of the trusts devolved upon him, and that he is insolvent, and has been acting as such trustee without having given bond or other security, and declares that nothing is to be paid to her, but that all money which has or shall come to his hands as trustee under the will is to be held by him for re-investment, and that he is not authorized to pay to her the interest accruing on the fund set apart in the will for her use and benefit.

It is well settled that courts of equity have power to remove trustees for neglect or breach of duty. It is not, however, "every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." If a trustee fails in the discharge

of his duties from an honest mistake, or a mere misunderstanding of them, or from a misjudgment of them, it is no ground for removal, unless such failure shows a want of the proper capacity to execute the duties. (2 Story Eq. Jur., § 1289; 2 Perry on Trusts, § 817; 1 Id. § 276; *Lathrop v. Smalley's Executors*, 8 C. E. Green, 192; *Thompson v. Thompson*, 2 B. Mon. 175.)

It is alleged that the trustee, Williams, was insolvent, and had given no bond for the performance of the trust. But there is no allegation that he was more insolvent than he was when he was appointed trustee. The will did not require him to give bond. On the contrary, it expressly provides that he and his co-executor should not be required to give bond as executors. It is evident that his testator did not intend that he should be required to give bond. The testator had a right to appoint him trustee, and authorize him to act as such without bond. His wishes should be respected.

The will authorized the trustee, Williams, to collect the \$12,000 as it became payable, and directed him to invest it, according to his discretion, for the benefit of plaintiff. A personal confidence was reposed in him by the testator. By the terms of the will plaintiff, or her husband, was not to have any control over the investment or disposition of the fund. While it was the moral duty of the trustee to consult plaintiff, in order to learn her necessities and ascertain her wishes, he was not required to make any investment, except such as he thought was to her best interest. All she was entitled to was the interest on the money bequeathed for her use, when it was collected. In case he and she thought it best to invest all or any portion of the fund in a home for her, she was to be consulted.

The only neglect of duty in respect to the bequest of \$12,000, charged in the complaint against the trustee, is the failure for about ten months to collect the first instalment thereof and interest. In order to constitute this failure a sufficient cause for removal, it must have been such as to endanger the trust property or show a want of honesty or reasonable fidelity. It does not appear that the trust fund was

endangered. For aught that appears, it was safely invested when left as a charge on the Bankhead place. The only injury, probably, suffered by plaintiff, was the loss of interest. He might, without intent to do her a wrong, have withheld from her the interest to be collected from McH. Williams as the instalments fell due, and insisted that it should be re-invested by him, since the will is susceptible of such a construction without doing violence to its language. We can see in this failure no dishonest, selfish, or improper motive, or any inducement therefor, unless it be a mistake of duty. He accepted the trust. He insists that he had no right to enter upon the execution of it, because the administration of the estate in Tennessee was not closed, and the statutory period for closing it had not expired. This probably accounts for the delay. We do not think he should be removed on this account.

It is insisted that the loan to C. M. Neel is a sufficient ground for removal. Be this as it may, there is nothing to show that such a loan was made by John H. Williams, except the statements contained in the supplemental answer of McH. Williams and the exhibits thereto, and they are not admissible as evidence against, and cannot affect, John H. Williams. (*Ringo v. Woodruff*, 43 Ark. 498.)

The trustee should not now be removed, but if he shall, hereafter, neglect the performance of his duties, the denial of this relief should be without prejudice to a future application for his removal.

McH. Williams states in his supplemental answer that he has paid the legacy of \$12,000 to the trustee, and that the trustee had loaned it to C. M. Neel on good security; and insists that the lands devised to him were thereby released from any liability for the legacy. It appears that this payment and loan were made long after the commencement of this action, and after the court had acquired jurisdiction of the persons of John H. and McH. Williams. This occurred after McH. Williams had answered and offered to bring into court money to pay so much of the legacy as was then due,

and submitted to its jurisdiction. Within ten days thereafter, if his statements are true, he paid the legacy.

The relief sought by this suit was the construction of the will of Willoughby Williams, deceased; the enforcement of the payment of so much of the legacy of \$12,000 as was due; the payment to Mrs. Nichol of the interest due on the legacy; and to secure the safe investment of so much of the principal of the legacy as was due, under the order and direction of the court. This relief was within the jurisdiction of the court. The court, in the exercise of it, had a right to require the instalments and interest due on the legacy to be paid into court, with a view to a safe investment of the principal thereof by the trustee under the control of the court. The court having acquired this jurisdiction, the action of defendants cannot render it powerless to afford the relief clearly within its power and defeat it in the exercise of its jurisdiction. Unless the loan, if any was made, was a safe investment in interest-bearing bonds, secured as required by the will, and was made in good faith, on terms advantageous to Mrs. Nichol, it and the payment of the legacy should be wholly disregarded, and the Bankhead place and McH. Williams held liable to the same extent they were before any payment was made. For the purpose of ascertaining whether or not such an investment was made, a reference should be made to a master, with authority to take testimony. If it be ascertained that such an investment was made, it should be permitted to stand, except as to so much thereof as may be interest collected on the legacy. If, on the contrary, it be ascertained that such an investment was not made, the amount due on the legacy should be ordered paid into court within a time specified, and in default of the payment thereof, within the time allowed, the Bankhead place should be sold, under an order of the court, by a commissioner appointed for that purpose, subject to the lien thereon for the payment of the instalments of the \$12,000 not due, and all other charges imposed on the land by the will; and the proceeds of the sale thereof, or enough to pay the amount due on the legacy, should be paid into court. (*The Attorney-General v. Clack*, 1 Beav. 468; *Cafe v. Bent*, 3 Hare, 245.)

When the legacy, or any part thereof, is paid into court, if the trustee and Mrs. Nichol shall agree that it will be to her best interest to invest the principal of the legacy, or any part thereof, in a home for her, then it should be so invested by the trustee; otherwise, it should be invested in first interest-bearing bonds, well secured by mortgage or deed of trust, by the trustee, on terms considered by him most advantageous to Mrs. Nichol; and whatever investment shall be made, it should be in the name of the trustee for the use of Mrs. Nichol, free from all the marital rights, claims, and control of her present, or any future husband she may have, and free from all debts or liabilities of either of them, and should be made under the control of the court, it seeing that the trust is faithfully executed, and the interests of Mrs. Nichol well protected. The interest due on the legacy should be paid to Mrs. Nichol, and if it has not been paid, or shall not be paid within a specified time, the Bankhead place should be sold to pay it.

The decree of the court below is reversed, and this cause is remanded with instructions to enter a decree according to this opinion, and for other proceedings.

MATTER OF THE FINAL ACCOUNTING OF GERRY.

[108 New York, 445.]

LIFE ESTATES AND REMAINDERS IN STOCKS OR BONDS.

Where, by the terms of a will, the testator leaves money, in trust, to be invested in certain specified interest-bearing securities, "the annual interest, income, and dividends thereof" to be paid to one for life, and "the principal or capital sum aforesaid," upon the death of the beneficiary for life, to be divided among certain of the testator's kindred, if, upon the sale of the securities, after the death of the life-tenant, a sum in excess of the original investment be realized, the surplus belongs to the remainderman, and not to the representatives of the life-tenant.

APPEAL from a judgment of the General Term of the Supreme Court. The facts are sufficiently set out in the opinion.

E. L. Fancher, for appellants.

George G. Kip, for respondents.

RUGER, CH. J. The matter here in controversy arises between the representatives of the life estate, and certain remaindermen, with reference to the proper distribution between them, of an increase in the amount of the trust fund, discoverable upon a sale of the securities in which it was invested, after the life estate terminated.

The fund was created in the year 1828 under the will of Peter P. Goelet, devising to his executors, as trustees, the sum of \$50,000, to invest "in funded stock of the United States, or of the State of New York, or in good bonds and mortgages on real estate," with directions to pay "the annual interest, income, and dividends thereof" to his daughter, Jean B. Goelet, during her life, and upon her death, leaving no issue, to divide the "principal or capital sum aforesaid" "among my other children in equal proportions." A codicil to said will, made in the same year, increased the said fund by an additional sum of \$20,000, which, upon the death of said Jean B. Goelet without issue, was also directed to be paid to her surviving brothers and sisters, or to their respective representatives.

During the existence of this trust, which extended for fifty-four years to the death of Jean B. Goelet in 1882, the annual interest collectible upon the sum invested was duly paid to her by its trustees. It does not appear affirmatively in the case in what securities the capital sum was originally invested, or when any investment or conversion of them occurred; but the evidence shows that in 1880 it was represented in unequal proportions by United States bonds, bonds of the cities of New York and Brooklyn, bonds and mortgages on real estate, and the sum of \$3,424.95 in cash. The cash seems to have been

the result of an increase in the value of some securities paid, exchanged, or converted by the trustees prior to 1880. In April, 1880, an order was made by the Supreme Court in a proceeding instituted by Robert Goelet and Ogden Goelet, who, with Elbridge T. Gerry, had succeeded to the said trusteeship under the will of Peter Goelet, who died in 1879, to ascertain the amount of said fund, the securities in which it was invested, and to obtain their discharge from the duties and obligations of said trusteeship, upon the delivery of said trust funds to their associate, Mr. Gerry. Jean B. Goelet and Mr. Gerry were both parties to this proceeding, and acquiesced in the order of the court appointing Mr. Gerry sole trustee, and defining the securities and capital of the trust fund as it then existed.

It may fairly be assumed from the evidence that this fund has always been kept invested in securities, upon which there was a fixed rate of interest, payable annually, determinable by the provisions of the security; and that it has never been possible for the trustee to receive or secure therefrom any extra dividends, or any greater annual income, than that producible by fixed rates of interest. A sale of these securities by the trustee after the death of the life-tenant resulted in a surplus of nearly \$23,000 over the amount of the original investment, and this sum is claimed respectively by the representatives of the life-tenants, and by the remaindermen.

The primary rule for the determination of questions arising upon the construction of wills, is the ascertainment of the intent of the testator from a consideration of its provisions. In the case in hand, the will provides specifically for the interest which the legatee for life was to take in the fund, and it is limited to the "annual interest, income, and dividends thereof." All beyond this must, from necessity, have been intended to go to the remaindermen, for there are no other persons who could lawfully take it.

This case is not analogous to, and presents none of the questions or embarrassments attending the division of gain or profits, arising upon investments in trade, or the stock of corporate business enterprises, and which are usually represented

by dividends, either regular or extra, payable in cash, stock, or scrip, or remaining undivided in the hands of the corporation. The authorities in such cases are very numerous, and show that it is often a matter of great difficulty to distinguish with precision between those gains constituting an accretion to the fund and those which legitimately may be termed the earnings of the investment, properly distributable by way of dividends to the stockholders of the corporation. In this case, however, the investment is directed to be made in securities bearing a fixed rate of interest, which can neither be increased by the prosperity, nor diminished by the misfortunes of the debtors, and are eventually to be satisfied by the repayment of the principal sum of the obligation.

At the time of the conversion of this fund by the trustee, he held in his hand obligations which, upon their face, called for the repayment to him of the sum of \$70,000 only, and the purchasers from him received obligations which, at maturity, were redeemable by the obligors at that sum. The cause occasioning the increase in question seems to have been a depreciation in the rate of interest effected by natural causes, and which gave an increased value to securities bearing the higher rates of former times. This constituted in no sense a profit upon the investment, but was an accretion to the fund itself arising from natural causes, and was liable to be altogether lost by the approximation of the securities to the period of their maturity. The benefit derivable from this condition was enjoyed annually by the beneficiaries of the fund in the increased value of the income derivable therefrom. Had the life-tenant lived to the maturity of the bonds, she would have received in annual interest the entire difference, if any existing at any time prior thereto, between the face and market value of the securities.

The theory of the will did not contemplate any traffic in securities by the trustee, but a permanent investment in interest-bearing obligations, subject to be sold or exchanged only when the exigencies of the trust required it to be done.

It is quite clear that the life-tenant could not have compelled the trustee to sell or convert securities lawfully purchased and held, upon the ground that their market value had

appreciated in his hands, any more than he could have compelled her to make good any depreciation in the value of such securities. Their acquisition and retention was one of the objects contemplated by the will of the testator, and was essential to execute his design, and a proceeding to compel their sale would plainly have been contrary to his intent in creating the trust. If the will had required the trustees to invest in real estate, the rents, income, and profits of which were made payable to the life-tenant with remainder over, it cannot be questioned but that any increase of the value of the land from natural causes would have been an accretion to the capital, and inured to the benefit of the remaindermen (*Perry on Trusts*, § 545, p. 486; *Cogswell v. Cogswell*, 2 Edw. Ch. 231, 240), and we can see no difference in principle between this case and the one supposed.

The question here presented was up in the cases of *Townsend v. U. S. Trust Co.* (3 Redf. 222), and *Whitney v. Pharis* (4 Id. 180), before the surrogate of New York, and it was there held that an enhancement of the value of United States bonds held in trust went to the remaindermen, and not to the legatee for life. These decisions accord with our views.

The cases cited by the learned counsel for the appellant may all be classified as cases where the terms of the trust authorized investments in the stock of private corporations or trading enterprises whose profits are largely affected by the vicissitudes of business and trade, and the disposition of whose gains and profits is largely, if not wholly, left to the discretion of the managers of the enterprise. In such cases it was plainly the intention of the settler that the life-tenant should have the advantage of any extraordinary profits realized from the investment. As we before said, these cases are not analogous.

The circumstance that the trustee in this case at some time invested a portion of the funds in unauthorized securities, would not seem to have effected any change in the respective rights of the life-tenant and remaindermen in the *corpus* of the trust. When the fact came to their knowledge in 1880, they each and all seem to have acquiesced in and approved the action of the trustee in making the investment, and it cannot

now be objected on the part of either of them that any interest of theirs was thereby varied or changed. It was optional with those parties at that time, by taking appropriate proceedings for that purpose, to have required the defaulting trustee to invest the fund in the securities specified in the will, or made compensation in some other form for the damages, if any, occasioned by his wrongful act; but it was also competent for them to ratify and approve the action of the trustee by accepting the securities held by him as representing the trust fund, and this we think was determined by the proceedings taken to release Robert and Ogden Goelet from the duties of trustees under the will. The action of the trustee in making the investments in question was sagacious and inured to the benefit of all the parties concerned, and they should not, after long acquiescence in such dealing, be allowed to obtain an advantage by questioning its legality.

But, further than this, we think the securities in which the funds were actually invested by the trustee until changed by some proceedings taken for that purpose, so far as the beneficiaries were concerned, represented the trust fund, and their earnings, income, and increase would, as between the several parties interested therein, be subject to the same rules of division and distribution as though it had been invested and kept on interest in accordance with the terms of the will. The remaindermen could not thereby be deprived of a natural accretion to the fund, however invested, or the life-tenant become entitled to an increase which, if the fund had been lawfully invested, would not have accrued to her. Indeed, in prosecuting this proceeding, the representatives of the life-tenant have ratified the acts of the trustee in making the investment in question by treating the unauthorized securities as the *corpus* of the fund, and claiming their increased value as income earned by the employment of the capital. In other words, while claiming the advantage to be derived from the unauthorized act of the trustee, they insist that such act was the efficient cause of transferring what was otherwise an accretion to the fund, going to the remaindermen, into profits accruing to the life-tenant.

The life-tenant was not the sole party interested in the determination of this question, and inasmuch as she, during her lifetime, and the remaindermen also, acquiesced in and approved the conduct of the trustee in making the investment, her representatives should not now be allowed to acquire an advantage by denying the lawfulness of his proceeding.

The judgment of the court below should be affirmed, without costs to either party.

All concur.

Judgment affirmed.

VANDERZEE vs. SLINGERLAND.

[103 New York, 47.]

DEVISE OF REAL ESTATE.—A FEE SUBJECT TO A CONDITIONAL
LIMITATION.

Where there is a devise or bequest to one absolutely, and in the event of his death, to another, it is the settled rule that the words of contingency refer to a death in the lifetime of the testator; so also where the devise over is not dependent solely upon the event of death, but upon a death in connection with some collateral event, as, *e. g.*, death without issue, death without children, and the like.

This latter extension of the rule rests more upon authority than upon reason, and the tendency of the courts in this country is to lay hold of slight circumstances in the will to vary the construction, and to give effect to the language of the testator according to its natural import.

APPEAL from a judgment of the General Term of the Supreme Court in favor of the plaintiffs. This was an action for partition. The facts sufficiently appear in the opinion.

Nathaniel C. Moak, for appellants.

E. Countryman, for respondents.

ANDREWS, J. The sole question presented is whether Cornelius Vanderzee took under the will of his father, Harmon

Vanderzee, an estate in fee simple in the homestead farm, or a fee subject to a conditional limitation in favor of the four grandchildren of the testator, named in the will, in the event of the death of Cornelius without issue. The testator died in 1840. His son Cornelius entered under the devise, and continued in possession of the farm until his death in 1876. The plaintiff, Cornelius Vanderzee, is one of the four grandchildren named in the will, and his right to maintain this action depends upon the nature and quality of the title which the testator's son, Cornelius, took under the will of his father. The will is brief, and is a will of real estate exclusively. The testator, in the first clause, directs that his debts and funeral charges shall be first paid out of his estate. The second clause is as follows: "All my real estate, as now in my actual possession, being my homestead farm, situate in the county of Albany, I devise to my son Cornelius, subject to the *proviso* hereinafter contained." The third clause directs that his wife, if she survive him, shall have an ample support from and out of the estate devised to Cornelius, during her life. The fourth, fifth, sixth, seventh, and eighth clauses bequeath severally to his three daughters, his son Teunis, and his grandson, Harmon Slingerland, money legacies amounting in the aggregate to \$1,700. The ninth and tenth clauses are as follows: "*Ninth*. The legacies above mentioned are to be paid to the legatees by my son Cornelius, in consideration of my devising unto him the aforementioned real estate, to be paid to them respectively within two years after my death. *Tenth*. In conclusion, my will is that if my son Cornelius dies without issue, that then the estate herein devised to him shall go to my grandchildren hereinafter named: Harmon T. Vanderzee, Cornelius T. Vanderzee, sons of my son Teunis; Harmon Slingerland, son of my daughter Elizabeth, deceased; and Harmon Houghtaling, son of my daughter Eve, share and share alike, and in case my son Cornelius should die before the provisions of this will become an act, the devisees last named shall perform and fulfill all the conditions required of my son Cornelius to the legatees named in this my will."

The whole question is whether the words, "if my son Cor-

nelius dies without issue," in the tenth clause, refer to the event of his death before that of the testator, or to a death at any time, whether before or after the testator's death. If the former is the true meaning, the gift over to the grandchildren was substitutionary merely, depending on the contingency of the death of the primary devisee in the lifetime of the testator, and designed to prevent a lapse; and upon that construction Cornelius, having survived the testator, the contingency upon which the grandchildren were to take was gone, and Cornelius took an absolute fee. If, on the other hand, the words refer to a death at any time under the circumstances mentioned, then, on the death of the testator, the grandchildren took a contingent interest under the will, by way of executory devise, which, on the death of Cornelius without issue, was converted into a fee in them, thereby displacing and subverting the conditional fee before that time vested in Cornelius. It has been claimed, indeed, that the devise to Cornelius was of a life estate only, but this is, we think, an inadmissible construction of the devise. The devise was in terms of all the testator's real estate in possession, and the language is sufficient both at common law and under the statute, without words of inheritance, to embrace the fee (1 R. S. 748, § 1), and the gift over, in the event only of the death of Cornelius without issue, furnishes the strongest ground of implication, that the testator intended to vest in Cornelius a title transmissible by descent to his issue.

It is said by Mr. Jarman (2 Jarm. on Wills, 752) to be an established rule that where a bequest is simply to one person, and in case of his death to another, the primary devisee surviving the testator takes absolutely. This rule applies both to real and personal estate, and so far as I know, the authorities in this country uniformly sustain the construction that where there is a devise or bequest *simpliciter* to one person, and in case of his death to another, the words refer to a death in the lifetime of the testator. (*Moore v. Lyons*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Briggs v. Shaw*, 9 Allen, 516; *Whitney v. Whitney*, 45 N. H. 311.) It is said in support of this construction that as death, the most certain of all things,

is not a contingent event, but the time only, the words of contingency in a devise in the character mentioned can be satisfied only by referring them to a death before a particular period, and as no other period is mentioned, it is necessarily presumed that the time referred to is the testator's own death. (*Edwards v. Edwards*, 15 Beav. 357.) We think this construction stands more strongly, in most cases at least, upon the probable intention of the testator. It prevents the disinheritance of a testator's posterity, which would often happen if a death of the primary legatee at any time was held to be within the meaning of the devise. It may be safely assumed that where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate for the benefit of collateral objects.

There are cases of another class than the one mentioned, in which an alternative limitation, depending upon the death of a primary legatee or devisee, is also held to refer to a death in the lifetime of the testator, although the cases are not within the reason upon which the construction in the class of cases first referred to is supported. One of the cases of the second class is where a devise is made to A., and in case of his death without issue or without children, or without leaving a lawful heir, then to B. It is manifest that the event on which the gift over is to take effect is distinctly pointed out, and is uncertain and contingent, viz., death without issue, &c.; and it is not necessary, in order to give effect to the words of contingency, to refer the death to one happening before the death of the testator. So, also, such a construction is not necessary to prevent the disinheritance of issue, for it is only in the event that there is no issue that the gift over is to operate. It is said by Mr. Jarman (2 Jarm. 783) to be the general rule that where the context is silent, words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator. It will be observed that the rule, as stated by the learned author, relates to personal property, and is deduced from the later English cases upon the construction

of bequests of personalty, coupled with a contingency, which seem to have modified the earlier decisions. But where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has, I think, been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue, in the lifetime of the testator, and that the primary devisee surviving the testator takes an absolute estate in fee simple. (*Clayton v. Lowe*, 5 Barn. & Ald. 636; *Gee v. Mayor of Manchester*, 17 Adol. & Ell. [N. S.] 737; *Woodbourns v. Woodbourne*, 23 L. J. Ch. 336; *Doe v. Sparrow*, 13 East, 359; *Quackenboss v. Kingsland*, 102 N. Y. 128; *Livingston v. Greene*, 52 Id. 118; *Embury v. Sheldon*, 68 Id. 227; *Waugh's Appeal*, 78 Penn. St. 436; *Mickleley's Appeal*, 92 Id. 514. But see *Britton v. Thornton*, 112 U. S. 526.) The case of *Quackenboss v. Kingsland* was that of a devise by the testator of the residue of the real and personal estate to "my son, Daniel Kingsland, and to his heirs, but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children, share and share alike;" and it was held, in exact conformity with the decisions to which we have referred, that the words referred to the death of the primary devisee in the lifetime of the testator. This rule of construction in this class of cases is founded in part upon the disinclination of the courts to cut down a fee once given, except upon clear words, but rests more upon authority and precedent than reason, for it is by no means certain that it was not the intention of the testator to control and provide for the ulterior devolution of the title, after it had been enjoyed during life by the primary devisee, in case he then died without issue, and such a construction would, it would seem, give effect more completely to the language used.

But the rule established by the courts applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without

issue, or other specified event. Indeed, the tendency is to lay hold of slight circumstances in the will, to vary the construction, and to give effect to the language according to its natural import. (*Buel v. Southwick*, 70 N. Y. 581; *Nellis v. Nellis*, 99 Id. 505; *Hennesy v. Patterson*, 85 Id. 91, 92.) In these and other cases which might be cited, the court found in the context indications of intention which took them out of the operation of the rule to which we have referred. We are of opinion that there are indications in the will now before us that the testator intended that the gift over to the grandchildren should take effect upon the death of his son Cornelius, without issue, at any time, either before or after his own death, and that the rule of construction which applies to the words "death without issue," when standing alone, does not apply to the will in question. The gift to Cornelius in the second clause of the will is made "subject to the *proviso* hereinafter contained." Reading this clause by itself, we should naturally expect to find in a subsequent part of the will some condition modifying in some contingency the estate given to Cornelius; and while the condition might, consistently with the language of the second clause, be either precedent or subsequent, the more natural meaning suggested by the words "subject to the *proviso* hereinafter mentioned," would be that the testator intended to subject the estate in the hands or possession of Cornelius, when he should take it under the will, to some condition. Looking then, at the tenth clause, we find a condition or *proviso*, which is that, on the death of Cornelius without issue, the estate should go over to the grandchildren. This provision in the tenth clause, standing alone, would, according to the general rule of construction, be construed as referring to the death of Cornelius, without issue, during the testator's life. But, construed in connection with the natural meaning of the second clause, there is color for a conclusion that it referred to a death either before or after the testator's. But more satisfactory evidence that the testator referred to a death at any time is found in the last paragraph of the tenth clause, which declares, "in case my son Cornelius should die before the provisions of this will become an act, the devisees

last named (the grandchildren) shall perform and fulfill all the conditions required of my son Cornelius to the legatees named in this my will." It seems obvious that the duty imposed upon the grandchildren by this clause was a duty to be discharged by reason of an omission or default of Cornelius to satisfy the legacies. If the object of this clause was simply to impose upon the grandchildren the duty of paying the legacies in case the alternative gift took effect by the death of Cornelius, without issue, in the lifetime of the testator, so that thereby they became primary devisees, the testator would naturally have expressed his intention in simple and clear language, as by declaring in connection with the gift over that the grandchildren should pay the legacies, or that they should take the land subject to their payment. The phrase, "in case my son Cornelius should die before the provisions of this will become an act," is obscure. But it is to be observed that Cornelius had, by the terms of the ninth clause, two years in which to pay the legacies. The testator must be assumed to have had in mind two contingencies, (1) that Cornelius might die before him, without issue, or (2) after him, but within the two years, and before he had paid the legacies. The last paragraph of the tenth clause was inserted, we think, to provide for both contingencies, and the burden of paying the legacies was imposed upon the ulterior devisees in case of the death of Cornelius either before the testator or after his death and within the two years, in case the direction for their payment should then be unexecuted. If this is the fair construction of the clause, then it is clear that the words "death without issue" referred to a death at any time, because it is inconceivable that the testator could have intended that the grandchildren should pay the legacies, except in the event of their taking under the devise. The clause is not that in case Cornelius dies before the will takes effect, then the grandchildren shall pay the legacies, but "in case he dies before the provisions of this will become an act," *i. e.*, before he shall have paid the legacies. The legacies were an equitable charge on the land. (*Harris v. Fly*, 7 Paige, 421, 422.) The fact that they were also personally charged on Cornelius does not,

we think, require us to hold that he took a fee simple. The circumstance that a devisee is personally charged with the payment of legacies is a fact resorted to in doubtful cases in aid of the construction of a devise, but is never decisive that a fee was given where a different intention is disclosed.

We think the judgment should be affirmed.

All concur.

Judgment affirmed.

GILMER vs. STONE.

[120 United States, 586.]

BEQUEST OR DEVISE TO A RELIGIOUS CORPORATION.—LATENT AMBIGUITY.

Where a testator made the following provision in his will, "I also, after paying all debts and claims against my estate, bequeath and devise the remainder of my estate to be equally divided between the board of foreign and the board of home missions," evidence *dehors*, the instrument is competent to show to what or to whom the gift belongs.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Illinois, dismissing a bill in equity to set aside a will and its probate for uncertainty so far as they related to the residuary devise and bequest.

D. T. Littler, L. A. Whipp, and R. E. Lewis, for appellant.

James McCartney, for appellee.

HARLAN, J. Robert Gilmer, late of Irish Grove, Menard County, Illinois, died December 31, 1883, having made a last will by which he disposed of his entire estate, consisting of about \$4,000, in personal property, and from three to four hundred acres of land in that State. The eleventh clause of

the will is in these words: "I also, after paying all debts and claims against my estate, bequeath and devise the remainder of my estate to be equally divided between the board of foreign and the board of home missions." The object of the present suit is to obtain a decree declaring that clause to be void, and directing the estate of the testator, after meeting the debts and the bequests contained in other clauses to be paid to the complainant, the uncle and only heir at law of the decedent.

The "Board of Foreign Missions of the Presbyterian Church in the United States of America," and the "Board of Home Missions of the Presbyterian Church in the United States of America"—corporations created under the laws of New York—severally appeared, were made defendants, and filed answers, each claiming the right to share in the devise in the eleventh clause of the will. The executors admit the justice of these claims, but ask the direction of the court in the premises. To these answers a general replication was filed; and, the cause having been heard upon the pleadings and proofs, the bill was dismissed with costs.

It is agreed in the case that the Baptist, Methodist, Episcopal, and other churches, like the Presbyterian Church in the United States of America, have boards of home and foreign missions; consequently, it is contended, the eleventh clause of the will is void for uncertainty as to the donee and the purposes of the gift. In this view we do not concur. It is undoubtedly the rule, in respect to the testamentary disposition of property, real and personal, that uncertainty either as to the subject or object of a devise will be fatal to its validity. But that rule has no application here; for, if there were no other facts in the case than that there are numerous boards which may be generally described by the words, the "board of foreign missions," and the "board of home missions," the devise in the eleventh clause would not fail. With respect to charities, gifts may be good which, with respect to individuals, would be void; "and where there are two charities of the same name, the legacy will be divided between them, if it cannot be ascertained which was the intended object." (1

Jarman on Wills, 376.) Can it be ascertained by competent evidence which of these various boards were the objects of the testator's bounty?

In the fourth clause of the will the testator bequeathed his library to the Presbyterian Church of Irish Grove; in the ninth, \$500 toward the erection of a Presbyterian church in Greenview, Illinois, provided the same was built within two years from the date of the will, otherwise the money should revert to his estate; and in the tenth, he bequeathed \$50 to be paid on the minister's salary of the Presbyterian Church of Irish Grove for the year 1884.

And there was extrinsic evidence to the following effect: That the testator had been for many years a member and ruling elder of the Irish Grove Presbyterian Church, one of the local congregations of the Presbyterian Church in the United States of America; that collections were annually taken up in that congregation for the various boards of that Church, including its Boards of Foreign and Home Missions; that while it was announced from the pulpit that collections would be taken for the Board of Foreign Missions or the Board of Home Missions, without in words naming the Presbyterian Church, all such collections, with the knowledge and assent of the Church Session, of which the testator was an active and zealous member, were, without exception, sent to the officers of the Presbyterian Boards of Foreign and Home Missions in New York city, and regular reports thereof made to the Session; that the testator took especial interest in the work of those particular boards, and uniformly contributed thereto; and that he did not, so far as his pastor or his associates in the Church Session knew, make contributions to the societies of any other Church, except to the Bible Society, which was sustained by several religious organizations.

Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the

words of the testator from their natural operation. It serves only to identify the institutions described by him as "the Board of Foreign and the Board of Home Missions;" and thus the court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention. "The law is not so unreasonable," says Mr. Wigram, "as to deny to the reader of an instrument the same light which the writer enjoyed." (Wigram on Wills, 2d Am. ed. 161.) The proof made a case of latent ambiguity. Such an ambiguity may arise, "either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject." (*Patch v. White*, 117 U. S. 210, 217.) In the same case it was observed that, "as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." (See, also, *Allen's Executors v. Allen*, 18 How. 385, 393; *Hinchley v. Thatcher*, 139 Mass. 477; *Breckinridge v. Duncan*, 2 A. K. Marsh. (Ky.) 50, 51; *Morgan v. Burrows*, 45 Wis. 211, 217; *Brewster v. McCall*, 15 Conn. 273; *Tilton v. Society*, 60 N. H. 377, 382; 1 Jarman on Wills, 423, 431; 1 Greenl. Ev. § 290.)

Construing, then, the will with reference to the extrinsic evidence of the uniform relations of the testator to the subject of foreign and home missions, and to certain societies engaged in that kind of work, it is not to be doubted that, in the eleventh clause, he had in mind the Boards of Foreign and Home Missions of the general religious society or organization of which he was a member and officer. The words of the will very well apply to such an object, and therefore, in so interpreting its provisions, no violence is done to the language employed by the testator.

It is also contended that the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America are foreign religious societies, or foreign societies organized for religious purposes, and, as such, cannot, under the laws of Illinois, take exceeding ten acres of land each, and

that the devise in the eleventh clause, being of more than three hundred acres of land jointly, is void and must fail.

In the case of *Christian Union v. Yount* (101 U. S. 352, 360), decided in 1879, we considered the question whether a conveyance made in 1870, by a citizen of Illinois, of real estate there situated, of the value of \$10,000, to the American and Foreign Christian Union, a New York corporation, was void and under the laws of Illinois—the object of that corporation being, “by missions, colportage, the press, and other appropriate agencies, to diffuse and promote the principles of religious liberty and a pure and evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists.” The validity of the conveyance was sustained upon the ground that the law of Illinois, as it existed in 1870, did not preclude a benevolent or missionary corporation of another State, being thereunto authorized by its own charter, from taking title to real estate within her limits by purchase, gift, devise, or in any other manner.

It is, however, insisted that the force of that decision is weakened, if not destroyed, by the failure of the court to refer to § 44 of c. 24 of the Revised Statutes of 1845, making it lawful for “the members of any society or congregation,” theretofore formed or thereafter to be formed, “for purposes of religious worship,” to “receive by gift, devise, or purchase, a quantity of land not exceeding ten acres, and to erect or build thereon such houses and buildings as they may deem necessary for the purposes aforesaid, and to make such other use of the land and make such other improvements thereon as may be deemed necessary for the comfort and convenience of such society or congregation.” (Rev. Stat. Ill. 1845, p. 120.) Counsel overlook the fact that the court, in *Christian Union v. Yount*, referred incidentally, and as indicating the general course of legislation in Illinois, to the like provision in the Act of 1872. No comment was made upon that provision, for the reason that it had no application to the case, there being no claim, as there could not well have been, that the American and Foreign Christian Union was, within the mean-

ing of the statute, a society or congregation "for purposes of religious worship."

In *St. Peter's Roman Catholic Congregation v. Germain* (104 Ill. 440), the Supreme Court of the State held that the foregoing section of the Act of 1845 was not repealed by the Act of March 8, 1869, providing "for the holding of Roman Catholic churches, cemeteries, and other property," but was displaced by the forty-second section of the Act of April 18, 1872 (c. 32 of the Revision of 1874), which last section however, the court said, was substantially the same as the forty-fourth section of the Act of 1845, and to be regarded as, in effect, merely continuing the latter in force.

We have, therefore, to inquire whether the devise in question is void under the Act of April 18, 1872. That act makes provision for the formation of corporations for any lawful purpose, except banking, insurance, real estate brokerage, the business of loaning money, and the operation of railroads other than horse and dummy railroads. It also makes provision for the incorporation of societies, corporations, and associations for any lawful purpose, not for pecuniary profit, "capable of taking, purchasing, holding, and disposing of real and personal estate for purposes of their organization." (§§ 29, 31.)

The Act proceeds:

"§ 35. The foregoing provisions shall not apply to any religious corporation; but any church, congregation, or society formed for the purpose of religious worship may become incorporated in the manner following, to wit: . . .

"§ 41. Upon the incorporation of any congregation, church, or society, all real and personal property held by any person or trustees for the use of the members thereof, shall immediately vest in such corporation, and be subject to its control, and may be used, mortgaged, sold, and conveyed the same as if it had been conveyed to such corporation by deed; but no such conveyance or mortgage shall be made so as to affect or destroy the intent or effect of any grant, devise, or donation that may be made to such person or trustee for the use of such congregation, church, or society.

"§ 42. Any corporation that may be formed for religious

purposes under this act, or under any law of this State for the incorporation of religious societies, may receive by gift, devise, or purchase, land not exceeding in quantity (including that already held by such corporation) ten acres, and may erect or build thereon such houses, buildings, or other improvements as it may deem necessary for the convenience and comfort of such congregation, church, or society, and may lay out and maintain thereon a burying ground; but no such property shall be used except in the manner expressed in the gift, grant, or devise, or, if no use or trust is so expressed, except for the benefit of the congregation, church, or society for which it was intended."

The forty-fifth section permits any congregation, church, or society incorporated under the act, to receive by grant, devise, or bequest, real estate, not exceeding forty acres, for the purpose of holding camp-meetings. (Rev. Stat. 1874, pp. 292, 293.)

Assuming for the purposes of this case only, that a church, congregation, or society, formed under the laws of another State for purposes of religious worship in that State, could not lawfully receive by gift, devise, or purchase, land in Illinois in excess of the quantity which may be received in either of those modes by a similar corporation formed under the laws of Illinois, we are satisfied that the sections last quoted from the Act of 1872 do not embrace corporations of the class to which these Boards of Foreign and Home Missions belong. The Board of Foreign Missions of the Presbyterian Church in the United States of America was formed "for the purpose of establishing and conducting Christian missions among the unevangelized or pagan nations, and the general diffusion of Christianity." Its power to hold real or personal estate in New York is restricted to such quantity as will produce an annual income not exceeding \$20,000. The object of the Board of Home Missions of that Church is "to assist in sustaining the preaching of the Gospel in feeble churches, and congregations in connection with the Presbyterian Church in the United States, and generally to superintend the whole of home missions in the behalf of such church as the General

Assembly shall, from time to time, direct; and also to receive, take charge of, and disburse all property and funds which, at any time, and from time to time, may be intrusted to said church or said board for home missionary purposes." It cannot take and hold real or personal property, the annual income of which shall exceed \$200,000.

While these boards are important agencies in aid of the general religious work of the Presbyterian Church in the United States of America, neither of them is, in any proper sense, or in the meaning of the thirty-fifth section of the Act of 1872, a church, congregation, or society formed for the purpose of *religious worship*. The counsel for the plaintiff in error seem to lay stress upon the more general words, "formed for religious purposes," in the forty-second section of the act; but manifestly the other parts of the same section, and previous sections, show that the only corporations intended to be restricted in the ownership of land to ten acres, were those formed for the purpose of "religious worship," and not to organizations commonly called benevolent or missionary societies. The reasons of public policy which restrict societies, formed for the purpose of religious worship, in their ownership of real estate, do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship, and cannot prescribe the forms of such worship, nor subject to ecclesiastical discipline those who fail to conform to the rules, usages, or orders of the religious society of which they are members.

This conclusion does not, in the slightest degree, conflict with the decision in *St. Peter's Roman Catholic Congregation v. Germain*. That was the case of a conveyance of about eighty acres of land directly to a congregation or society "formed for the purpose of religious worship," as distinguished from a benevolent or missionary organization. The court held that, under the legislation of Illinois, "a religious corporation is authorized to receive or acquire lands to the extent of ten acres, and no more. Any amount in excess of that is expressly forbidden by statute, and it follows that all conveyances,

deeds, or other contracts made in violation of this prohibition, are absolutely void."

As the eleventh clause was intended to pass, and was valid for the purpose of passing, to the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America the estate thereby devised, the decree must be affirmed, and it is so ordered.

Affirmed.

WHEELER vs. FELLOWS.

[52 Connecticut, 238.]

BEQUEST OF THE RESIDUUM.—CODICIL.—EXPRESS TRUST.— PERPETUITIES.

Where a testator made a codicil to his will in the following language, "Whenever the youngest of my grandchildren shall attain the age of eighteen years, the respective shares the income of which is given to my sons, shall be divided in fee equally among their respective children then living, and if any of them shall then have deceased, leaving children or other descendants, then such children or other descendants shall take the share which would have belonged to his or her deceased parent or ancestor, had he or she then been living," the devise is void as in contravention of the statute against perpetuities.

Suff for the settlement of the rights of the parties interested, and for the distribution of a trust fund. The facts appear in the opinion.

S. E. Baldwin, for plaintiffs.

F. W. Fellowes, for defendants.

PARK, C. J. In the year 1862 James Fellowes, of the town of New Haven, whose children were three sons, made his will; in which, after making provision for his widow during her life, and after devising a building lot on Whitney avenue to each of his two younger sons to make them equal in this respect to his

elder son, to whom he had previously deeded a building lot upon the same avenue, he divided all the residue of his property, both real and personal, into three parts, and gave one of the parts to each of his three sons in fee. Two years afterwards he made a codicil, in which he put into the hands of trustees the two building lots on Whitney avenue, given in the will to his younger sons, and gave each of them, respectively, the rents and profits of the same lot devised to him in the will, during his life, and on his decease to his widow during her life.

The codicil then proceeds as follows: "All the rest and residue of my property I give, devise, and bequeath to my executors, in trust for the purposes following, to wit: to divide the same into three equal parts or shares, and therefrom to pay over quarterly the rents, issues, and profits of one of the shares to my son Richard S. Fellowes during the term of his natural life; to pay over the rents, issues, and profits of the second of the said shares quarterly to my son, Samuel M., during the term of his natural life, and after his decease to his present wife, if she shall survive him, during the term of her natural life; and to pay over the rents, issues, and profits of the third of said shares quarterly to my son, Frank W., during the term of his natural life, and after his decease to his present wife, if she shall survive him, during the term of her natural life. Whenever the youngest of my grandchildren shall attain the age of eighteen years, the respective properties, estates, or shares, the income of which is devised to my sons and their present wives for life by this codicil, as aforesaid, shall be divided in fee equally among their respective children then living, and if any of them shall then have deceased, leaving children or other descendants, then such children or other descendants shall take the share that would have belonged to his or her deceased parent or ancestor had he or she then been living; provided, however, that such distribution shall in no way impair the right of my sons or their wives to receive the income of said property, or such portions thereof as are bequeathed to them by the foregoing provisions of this codicil."

At the close of the codicil the testator re-affirmed and re-

published his will, except so far as the codicil altered or modified its provisions.

At the time of the execution of the will and codicil, and on the death of the testator, there were living three sons, and grandchildren of the testator by each of them, the youngest of which grandchildren arrived at the age of eighteen years on the eleventh day of August, 1879.

These are the principal facts of the case, and the first question to be determined is, whether the residue of the property is increased by the codicil above what it was in the will.

We think it remains the same. It is clear by the will that the testator intended an equal distribution of his property among his children and their descendants. He gave to each of his younger sons a building lot in his will, manifestly to make them equal in this respect to his elder son, to whom he had previously deeded a similar lot, and all through the will and codicil this intent clearly appears in all the particular provisions that are made in them. Now, if the fee of the two building lots on Whitney avenue, given in the will to the two younger sons, falls into the residuum of the codicil, equality would not exist, for the eldest son, who had a building lot deeded to him by the testator, would share to the extent of one third in the fee of these two lots in addition to the one he already had. And furthermore, if we should give to the residuary clause of the codicil the full scope of its meaning, it would include the provision made by the testator in his will for the support of his widow, which surely was never intended to be done. And inasmuch as the codicil does not make any particular disposition of the fee of these two lots, we think it continued to remain in the sons, where it was placed by the will, and that the residuary clause in the codicil was intended to include, and does include, only the property embraced in the residuary clause of the will.

The residuary estate ought to have been divided into three equal parts, so far as it could have been done, as soon after the settlement of the estate of the testator as practicable. This was manifestly the intent of the testator. Each third part of the residuum was left for a different line of owners, and those

of the other lines were intended to have no interest in it. Whether it increased or diminished in value, it was of no importance to them, unless the line should become extinct, when it would be the subject of inheritance. Inasmuch as this has not been done, it should be divided into three equal parts, so far as practicable, as soon as it can reasonably be done, and each of the parts set to each of the lines respectively.

Another question made in the case is, when shall each of the three equal parts be distributed in fee to the children of each of the sons respectively? The codicil says, when the youngest grandchild of the testator shall arrive at the age of eighteen years. But must such grandchild be the youngest living at the death of the testator, or be the youngest that should at any time be born? We think it must be the youngest living at the death of the testator. The other view would render this part of the codicil obnoxious to the statute against perpetuities, for the residuum is to be divided in fee when the youngest grandchild of the testator shall have arrived at the age of eighteen years; and if the youngest grandchild that should at any time be born is to be the one, it is easy to see that the residue would or might be carried to parties beyond the statute requirement for estates to vest, either in this State or in the State of New York, where some of the real estate lies which is included in the residuum.

Our statute on the subject, so far as it applies to this case, is as follows: "No estate in fee simple . . . shall be given by . . . will to any persons but such as are, at the time of making such . . . will, in being, or to their immediate issue or descendants." (Gen. Stat. p. 352, § 3.) The statute of New York on the subject is as follows: "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate." (1 N. Y. Rev. Stat. pt. 2, c. 1, tit. 2, art. 2.)

The codicil, in substance, is as follows: "The residue shall be divided in fee among such of my grandchildren as shall be living when my youngest grandchild shall arrive at eighteen

years of age. And if any of my grandchildren shall then be dead, leaving children or grandchildren surviving them, such children or grandchildren, as the case may be, shall take the share of their deceased parent or ancestor."

Here the absolute power of alienation is suspended till the youngest grandchild of the testator shall arrive at eighteen years of age, and if the youngest grandchild that should at any time be born shall be the one to be taken, the suspension must continue till after the death of all the children of the testator; for not till then could it be determined who the youngest grandchild would be. Hence such construction would make the distribution clearly void by the statute of New York, for the suspension would continue longer than two lives in being when the estate was created; and such construction would likewise make the distribution void by our statute, for the estate might be carried to parties not in being when the will was made, and not the immediate issue of parties then in being. We think, therefore, that the youngest grandchild living at the death of the testator must be the one whose age must determine when the distribution of the residue in fee is to be made.

But however this may be, we think the distribution in fee must be declared void, in any view of the case, as being obnoxious to the statute of perpetuities of this State, and also of the State of New York.

It is manifest that no estate in fee can possibly vest in any parties till the youngest grandchild shall arrive at the age of eighteen years. Till then it could not possibly be known where the estate would go by the terms of the codicil. It must be divided among the grandchildren if living; but they may all be dead, leaving children, and possibly grandchildren, who will take the estate by representation directly under the codicil. Hence it is clear that the estate is beyond the reach of alienation or vesting till such time shall arrive.

The power given to the trustees to sell at their discretion is not enough. If they exercise their discretion, the will requires that they shall re-invest the proceeds of the sale, which

would be merely changing the estate from one form into another. (*Hawley v. James*, 16 Wend. 62.)

Our statute is imperative that the estate must be given to parties in being when the will was made or to the immediate issue of parties then in being. If by possibility the estate might be carried by the terms of the will to parties not then in being, and who are not the immediate issue of parties then in being, the will in this respect is void. (*Alfred v. Marks*, 49 Conn. 473.)

In this case it was uncertain whether the youngest grandchild living at the death of the testator would continue to live till she was eighteen years of age; but in the event of death, the codicil might possibly be construed to mean the time when she would have arrived at eighteen years of age, if she had continued to live, as the time intended by the testator that distribution in fee should be made; or, possibly, the youngest who should arrive at eighteen years of age might be held to be the one intended.

But it is easy to see that great changes might have occurred in this family before such time should arrive. During the interval between the making of the codicil and the time for distribution in fee, all the grandchildren of the testator living when the codicil was made might have died, leaving children and grandchildren born after the date of the codicil. Thus three generations might have come into being during the interval, and many of them might have died. There was time enough for all this. Suppose a grandchild had been born immediately before the death of the testator, and another had been born immediately after the codicil was made. Suppose the testator had lived twenty years after the making of the codicil. Here the interval of time between the making of the codicil and the time for distribution would be thirty-eight years; time sufficient for the grandchild, born after the codicil was made, to grow up and have children and grandchildren, making three generations after the codicil was made; and the grandchildren would take the property by the terms of the codicil at the time distribution should be made if their ancestors had died—two generations after the limitation by our

statute. If we suppose a grandchild born immediately after the death of the testator, and one immediately before his death, then eighteen years would elapse before the time for distribution; which would be time sufficient for the grandchild born after the testator's death to grow up and have children, before the time for distribution, who would take the estate by the terms of the codicil if their ancestors had died—one generation beyond the limitation of our statute. Clearly, then, the distribution in fee provided for by the codicil is void by our statute.

And it is equally so by the statute of the State of New York. In the case of *Hawley v. James* (16 Wend. 62), the testator, after stating his purpose of confiding the care and management of his estate to trustees, provided as follows: "This trust shall continue, and the final division of my estate shall not take place until the youngest of my children and grandchildren, living at the date of my will, and attaining the age of twenty-one years, shall have attained that age." He had at that time thirteen children and grandchildren who were minors, the eldest of whom was of the age of eighteen years, and the youngest was a grandchild of the age of eleven months. The other minors were of different ages between one and eighteen years.

The court say: "The question is not whether the trust probably will, but whether it can, transgress the statute rule. It must be so limited in point of duration that it cannot in any event exceed two lives; otherwise it is void in its creation. There is no way in which we can give effect to the statute but by adhering strictly to the measure of duration which it prescribes. The utmost limit for which alienation may be suspended must be measured by lives, and there can be only two lives. The lives must be designated. This may be done either by naming two persons in particular, or else by describing a class of persons, and bounding the suspense of alienation by the lives of the first two who shall die out of the class. If the two last lives are taken, it is obvious that the suspense will continue for as many lives as there are persons in the class. The limitation may be for a shorter period than two lives; it

may be for a single life. The estate may also be limited so as to depend on some event other than life; as an estate to A. for ten years, if B. and C., or either of them, shall so long live. Here the estate may determine either by the lapse of the ten years or by the death of B. and C., but it can in no event exceed two designated lives. So an estate during the minority, widowhood, or other stage of existence through which two individuals may pass, would be good, because it could not by any possibility extend beyond two designated lives. But life must in some form enter into the limitation. No absolute term, however moderate, or however short, can be maintained; and no uncertain term, the utmost limit of which is not bounded by lives, can be sustained. In short, the statute has said that alienation shall not be suspended beyond two lives *by any limitation or condition whatever*, and any disposition which may work a larger suspense must be utterly void."

In the case of *Smith v. Edwards* (88 N. Y. 92), the testator directed that \$30,000 should be kept invested until his youngest grandchild then born, or that might thereafter be born before the final distribution of his estate, should be of age. He then directed his executors to make distribution when his youngest grandchild born, and that might within twenty years be born, should arrive at full age, or, if a granddaughter, when she should be lawfully married. The parties to whom distribution was to be made were left uncertain until such time should arrive. The court held the bequest void by their statute of perpetuities. The court say: "The absolute ownership is suspended in one of two ways; either by the creation of future estates vesting upon the occurrence of some future and contingent event, or by the creation of a trust, which vests the estate in trustees. In both ways, it is argued, this will offends. If by its terms a trust estate is in fact created, the result asserted is inevitable; for such trust estate would run for a fixed period of time which might exceed the limit of two lives in being at its creation, and is not bounded by the continuance of lives at all. . . . The condition of survival attached to the gift itself; who the legatees would in fact prove to be,

depended upon a future contingency. Those who were to take in the prescribed event were uncertain until it happened; they might not be any one of those *in esse* at the testator's death, and might prove to be a grandchild born twenty years later. The ultimate vesting of this portion of the principal of the special fund was therefore plainly postponed for twenty years, and not during designated lives in being, and must be declared invalid." (See also *Robert v. Corning*, 89 N. Y. 225; *Purdy v. Hayt*, 92 N. Y. 446; *Schettler v. Smith*, 41 N. Y. 334.)

Here an express trust was created to continue till distribution in fee should be made, and the codicil in this respect is clearly void by the statute of New York against perpetuities.

The invalidity, however, of the ultimate disposition of the fee intended by the testator, does not impair the effect of the trust created by the codicil, so far as concerns its provisions for the life estates of his sons, and of the widows of Samuel and Frank. Each of the sons upon the testator's death became entitled to one-third of the estate in fee, subject to the trust estate created to endure during his life, and in the case of each of the younger sons, during the life of his wife, and subject further to the provision for the testator's widow. We are inclined to the opinion that the codicil revoked the disposition of the fee made in the will in favor of the sons. But, however this may be, they took the same estate, whether it came to them by the will or by inheritance. In either case the codicil incumbered the fee by the life estates therein, and therefore it is unnecessary to decide this question.

We therefore advise the Superior Court that the residuary estate described in the codicil embraces all the property which the residuum of the will embraced, and no more; and, that the residuary estate, exclusive of what is left in trust for the testator's widow, should be divided by the surviving trustee into three equal parts, and one part set to each of the three different lines of owners.

Possession of Richard's third should be at once delivered to those entitled to it by succession from him. Possession of

Samuel's third should be retained by the trustee during the life of Samuel's widow. Possession of Frank's third should be retained by the trustee, or his successor in the trust, during the life of Frank and his wife.

On the decease of the testator's widow a similar division and disposition should be made of the trust property held for her use.

In this opinion the other judges concurred.

BALDWIN vs. SPRIGGS.

[65 Maryland, 373.]

REVOCATION BY BIRTH OF CHILDREN.—PROVISION FOR AFTER-BORN CHILDREN.

Marriage and issue born, in general, operate to revoke a will previously made.

APPEAL from the Orphans' Court of Anne Arundel County.

Edward C. Gantt, for appellants.

James Revell and *Daniel R. Magruder*, for appellees.

STONE, J. There is no dispute about the material facts in this case. James Spriggs, of Anne Arundel County, on the 25th of July, 1865, duly executed his will. By that will he disposed of all the property, real and personal, which he then owned. James Spriggs, at the time of the execution of the said will, had a wife, Ruth Spriggs, then living, and several children by her also living. By his said will he devised all his property to said wife and children. His wife Ruth died in 1871, and said James soon after the death of said Ruth, about 1874, intermarried with Maggie E. Vane, and also had by her several children. Said James Spriggs died in January,

1886, leaving a widow, the said Maggie E. Spriggs, and a child by the said Ruth, and children by the said Maggie E., surviving him. After the execution of the will, the said James Spriggs purchased certain other real estate which was unaffected by said will. His will as to his real estate contained no residuary clause, but disposed of all the real estate he owned at its date, by specific description. After the death of James Spriggs, his will was offered for probate in the Orphans' Court of Anne Arundel, and a *caveat* was filed thereto by his second wife, Maggie E. Spriggs, in behalf of herself and her children, and upon such *caveat* plenary proceedings were had, and the Orphans' Court ordered and decreed that said will was revoked by his subsequent marriage and the birth of issue, and refused to admit the paper to probate. From this decree the daughter of the testator by his first wife and two of his grandchildren have appealed to this court. These are all the facts necessary to elucidate the legal proposition which we are called upon to decide, and which is simply, whether upon this state of facts the will of James Spriggs has been revoked by operation of law. It would be a profitless task to review all the English cases on the subject. They may be found by the curious fully discussed by Chancellor Kent, with his usual ability, in the case of *Brush v. Wilkins* (4 Johns. Chan. Rep. 506). It is enough for us to say that after a good deal of doubt and hesitation, it was finally settled in England, *before our Revolution*, that marriage and issue taken together did amount to an implied revocation of a will previously made, and that such implied revocations were not within the Statute of Frauds, but that such implied revocations might be rebutted and controlled by circumstances.

The final determination of the matter seems to have been reached by the cases of *Christopher v. Christopher*, decided by the Court of Exchequer, Parker, C. B., presiding, in 1771 (2 Dickens, 445), and the case of *Spraage v. Stone*, decided in 1773 (Ambler, 721).

These cases appear to have definitely settled the law that a subsequent marriage and birth of a child standing alone, and

unaccompanied by other circumstances, amount to an implied revocation of a will.

The whole subject, says Chancellor Kent, has continued to receive great discussion in the English courts since the era of our Revolution, growing out of new cases constantly arising amidst the endless variety of human affairs.

The most important of the English cases since the Revolution is the case of *Marston v. Roe dem. Fox*, decided in 1838 by fourteen out of the fifteen English judges (8 Adol. & Ell. 14), where the general doctrine we have stated was re-affirmed. We will recur to this case again for another purpose.

But we are not without decisive authority in our own State. The unreported case of *Sedwick v. Sedwick*, decided at June Term, 1844, was a case similar to the one at bar, and the Court of Appeals decided that the subsequent marriage and birth of a child did revoke the will, and they affirmed the decree of the Orphans' Court refusing it probate.

No opinion was filed in the case although a large amount of property was involved, and the case was argued by some of the most eminent counsel in Maryland. But they did flatly decide the question by a decree, declaring the will revoked by the subsequent marriage and birth of a child.

But while such is the general rule, like other general rules, it has been held in England subject to some exceptions. Among the exceptions is the one where the testator has made provision for his children born after the execution of the will. As the origin of the rule was the duty of the parent to provide for his offspring, this exception seems right and proper.

Another matter upon which the English courts have exercised themselves, is the determination of the ground upon which the doctrine of implied revocation ought to be rested.

This is of practical importance in this case, and will require some examination. Lord Mansfield, in the case of *Brady v. Cubitt* (1 Dong. 31), thought the rule should rest on the presumption that the testator intended to revoke his will, and that it therefore followed that such presumption might be rebutted by even parol evidence.

To use his own words, that such presumption might be re-

butted by "every sort of evidence." But Lord Mansfield's view seems to us irreconcilable with the Statute of Frauds. It would, in effect, allow the will to be revoked by the subsequent intention of the testator, without such intention being evidenced by the positive acts so expressly required by that statute.

That view leads to another difficulty, that the testator may change his first intention and adopt a contrary one, and if so, which of the two intentions is to prevail?

The conclusion, however, that Lord Mansfield reached, that every sort of evidence was admissible, was but the logical consequence of the ground upon which he rested the rule, namely, that of *presumed alteration of intention*.

This case was decided in 1778.

But the courts there seem to have felt the difficulties that would result from such a view, and Lord Kenyon, in *Doe dem. Lancashire v. Lancashire* (5 Term Rep. 49), decided in 1792, placed the rule upon another ground, namely, *a tacit condition annexed to the will when made* that it should not take effect if there should be a total change in the situation of the testator's family. This view of Lord Kenyon was afterwards adopted by Lord Ellenborough in the case of *Kenebel v. Scrif-ton*, decided in 1802 (2 East, 534).

Finally the court, in *Marston v. Roe dem. Fox*, heretofore cited, unanimously adopted the views of Lord Kenyon, and it may now be considered as settled in England that the doctrine of implied revocation rests upon the ground of a tacit condition annexed to the will *when made*, that it should not take effect if there should be a total change in the situation of the testator's family. In this we concur.

If we adopt the English rule that the will is not revoked if the testator makes provision for the children of the subsequent marriage, the question arises in the case at bar whether he can be considered to have made such provision by the purchase of the property acquired by him between the date of his will and his death. This question must be answered both upon reason and authority, in the negative.

The testator disposed of all the property he then owned by

his will; but he lived twenty years after its date, and in the meantime purchased other real estate, which the children of the second wife would share with those of the first. But the mere *accumulation* of additional property cannot, upon any ground of reason, be considered a *provision* made by the testator for the second set of children any more than for the first set, as the latter are equally benefited by it. The injustice of considering after-acquired property a provision for the second children will be the more readily seen if we consider a case (and such have frequently occurred) where the beneficiaries under the will were comparative strangers or remote collaterals.

Again, if after-acquired property should be held a provision for the after-born children, how much property must be so acquired? It could hardly be said that the purchase of an acre of poor land, or a cow or horse could be so considered, and if not, by what rule should the value of such property be estimated?

But we are not without authority on this subject. In *Marston v. Roe dem. Fox*, above cited, the point was made that an after-purchased estate did not pass by the will, but descended to the son in fee, and thereby became a provision for him and prevented the revocation; but in answer to this objection the court said:

"In the first place we answer that no case can be found in which after-acquired property, descending upon a child, has been allowed to have that effect, and indeed such a proposition seems incompatible with the nature of a condition annexed to the will."

To determine that after-acquired property was a provision for the after-born child, would be totally inconsistent with the theory that the rule of implied revocation rests upon the tacit condition annexed to the will *when made* that it should not take effect if there should be a total change in the situation of the testator's family. Instead of the change in the *family*, it would make a change in the *property* one of the essential elements to determine the implied revocation. The will of

the successful testator would stand, that of the unfortunate would be revoked.

Upon the whole case presented by the record before us, we are of opinion that the testator having disposed of the whole of the estate owned by him at the date of his will, and having again married and had children by his second wife, and having made no provision for such children, that his will was revoked by operation of law, and that the order of the Orphans' Court must be affirmed.

Order affirmed, the costs to be paid out of the estate.

Revocation by Marriage and Birth of a Child.—It was the rule at common law, established after long controversy, that marriage and the birth of a child would revoke a will of real as well as personal property. *Christopher v. Christopher*, 2 Dick. 445; *Spraage v. Stone*, Amb. 721; *Brush v. Wilkins*, 4 Johns. Ch. 510.

These circumstances had long been held sufficient to revoke a will of personal property. *Overbury v. Overbury*, 2 Show. 353; *Lugg v. Lugg*, 1 Ld. Raym. 441.

The same is true in the case of a subsequent marriage and the birth of a *posthumous* child. *Doe v. Lancashire*, 5 T. R. 49.

And the rule applies equally when the testator is married, and upon the death of his wife re-marries, and has children by the second marriage. *Christopher v. Christopher*, 2 Dick. 445.

Under the statute of Massachusetts, an omission by a testator to provide for a child in his will revokes the will *pro tanto*, unless it appear that the omission was intentional, and not by any mistake or accident. 47 Mass. (6 Metc.) 400.

So in Wisconsin. *Bresee v. Stiles*, 23 Wis. 120.

And in California. *Estate of Utz*, 48 Cal. 200. Here it was held that the use of the word "children" did not indicate a deliberate purpose to exclude the children of a deceased daughter, and they were accordingly admitted.

In a very recent case in Massachusetts, a widow, with three children, whose only property was derived from her deceased husband, contemplating a second marriage, made a will by which she bequeathed all her property received from her first husband to her three children. Her intended husband knew the contents of the will, and orally assented to its execution. The widow then married, and had a child by her second husband. It was held that the will was thereby revoked. The court said: "Upon these facts a revocation of the will is simply implied by law,

and this implication cannot be rebutted by parol evidence that the parties did not know the rule of law, or that they did not intend that the subsequent marriage and birth of a child should operate as a revocation." *Nutt v. Norton*, 143 Mass. 242.

But the subsequent birth of a child alone does not by the common law amount to a revocation. *Shepherd v. Shepherd*, 5 T. R. 51 n.; *Doe v. Barford*, 4 M. & S. 10. In the former case it is said by the court: "But I do not find any case which goes to prove that a married man's will may be set aside by the birth of children. . . . Marriage and children at once revoke a will, but marriage alone will not. . . . This is settled in abundance of cases, and is an incontrovertible position; and as marriage alone will not do this, so the birth of children alone will not, unless under very special circumstances."

In Michigan a woman's will is not revoked by her subsequent marriage so long, at least, as no children are born. *Noyes v. Southworth*, 55 Mich. 173.

To the same effect Chancellor Kent says: "The better opinion is that under the English law there must be the concurrence of a subsequent marriage and a subsequent child to work the revocation of a will." 4 Com. 528.

In some of the earlier cases it was held that subsequent marriage and the birth of a child raises a presumption of revocation, thus making it depend upon the testator's intention. *Brady v. Cubitt*, 1 Doug. 31; *Fox v. Marston*, 1 Curt. 494; *Talbot v. Talbot*, 1 Hag. 711.

In *Johnston v. Johnston*, 1 Phil'im. 447, it was held that, where the testator had provided for a child of which his wife was *enccinte*, and died suddenly, leaving three subsequent children unprovided for, his estate having meantime increased from £20,000 to nearly £800,000, the will was revoked. This was upon the ground that the circumstances left no doubt of the testator's intention.

But the modern doctrine is that it depends upon a tacit condition which the law annexes to the will when made, that if the testator marries, and has a child born of that marriage, there shall be a revocation. *Marston v. Roe dem. Fox*, 8 Ad. & El. 14; *Brush v. Wilkins*, 4 Johns. Ch. 510.

There is, however, an exception to the general rule, where the will does not dispose of the entire estate; but the testator has, either before or at the time of making will, provided in writing for the future issue. *Kenebel v. Scrafton*, 2 East, 529. It is not sufficient that provisions be made for the *wife only*, but it must extend to the children of the marriage. *Marston v. Roe dem. Fox*, 8 Ad. & El. 14.

In *Ex parte* the Earl of Ilchester, 7 Ves. 348, where the testator married a second time, and had children by the second marriage, Lord Eldon held that the will was not revoked, because the wife and children were provided for by a settlement.

The] revocation takes effect in order to let in an after-born child, and there is no revocation where the result would be that a child of a former marriage would take as heir at law. *Sheath v. York*, 1 Ves. & B. 890. In this case a widower, having a son and two daughters, devised his estate, real and personal, and then married and had a daughter. The will was held to be revoked as to the personal, but not as to the real estate.

This subject is now regulated in England by statute. 1 Vic. c. 26, §§ 18, 19 (1837). This provides that every will made by a man or woman shall be revoked by marriage. The birth of a child alone, not being included in the enactment, is not sufficient to revoke a will.

The American cases generally sustain both the rule and the exception. *Brush v. Wilkins*, 4 Johns. Ch. 510; *Havens v. Van Den Burgh*, 1 Denio, 27; *Wilcox v. Rootes*, 1 Wash. (Va.) 140; *Nutt v. Norton*, 142 Mass. 242.

In *Havens v. Van Den Burgh*, 1 Denio, 27, the court held that marriage and the birth of a child were an implied revocation of a will previously made, disposing of the testator's whole estate, where there is no provision in or out of the will for such new relations; and it makes no difference whether the testator had children at the date of his will or not.

In Ohio, under the statute, the subsequent birth of a child alone works a revocation. *Ash v. Ash*, 9 Ohio St. 386; *Evans v. Anderson*, 15 Id. 324.

In Iowa, the subsequent birth of a child is held to revoke a will, irrespective of statute. *McCullon v. McKenzie et al.*, 26 Iowa, 510; *Negus v. Negus*, 46 Id. 487; *Fallon v. Chidester*, 46 Id. 588. And the same is true of an illegitimate child recognized by the father. *Milburn v. Milburn*, 60 Iowa, 411.

GIBBENS vs. GIBBENS.

[140 Massachusetts, 102.]

CONSTRUCTION OF A WILL.—GIFT TO CHILDREN UPON THE DEATH OF THE WIFE.

A testator by his will gave to his wife the use of his furniture, pictures, and books; and provided that "all such articles as are not consumed in the use, and shall remain in existence at my wife's marriage or decease, shall then go to my children." The will also gave to the wife all his estate, real and personal, to hold during her widowhood, and further provided as follows: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." *Held*, that, under the last clause, the children of the testator took vested interests.

BILL in equity, by the administrator with the will annexed of the estate of Daniel L. Gibbens, to obtain the instructions of the court as to the construction of the will. Hearing before Devens, J., who reserved the following case for the consideration of the full court.

The will of Daniel L. Gibbens, who died on August 16, 1853, contained the following provisions :

"I give to my wife, Mary R. Gibbens, the use of all my household furniture, plate, pictures, books, and utensils ; also all the family stores, which shall be in the house at the time of my decease, and destined for family maintenance. All such articles as are not consumed in the use, and shall remain in existence at my wife's marriage or decease, shall then go to my children, they to share the same equally. I also devise and bequeath to my said wife, to hold during her widowhood, all my estate, real, personal and mixed, upon the trust, and for the intent and purpose, that by and from the net income and produce thereof, she may maintain herself and our family as now composed, and afford a home to those of my unmarried daughters who shall desire to join the family hereafter."

"In case my said wife shall marry after my decease, then upon such event happening, she shall receive only one-third part of the net income of my real estate, and one-fourth part of the net produce of my personal property ; the residue of such income and produce shall thereafterwards, during the continuance of my wife's life, be equally distributed to and among my children.

"At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent."

A subsequent clause of the will gave the widow power to sell certain real estate ; directed that the proceeds should be invested, the income to be taken by the widow for the use of herself and family ; and provided that "the capital sum, at her death, is to be equally distributed among my children."

The testator had been twice married. He left a widow and

nine children surviving him, four of whom were by his first wife and five by his second wife.

On April 11, 1858, Harriet L., one of his children by his first wife, died. By her will, she left the bulk of her property to the children of her father by his first marriage. Of this will, Joel Wheeler, one of the defendants, was appointed executor.

The widow of Daniel L. Gibbens died on January 9, 1884. The estate of Daniel L. consisted of money and personal property, and of real estate. By an agreement of the parties, the real estate has been sold, and the proceeds, except a sum of money equal to the share which would have come to Harriet L., had she survived the widow of the testator, have been paid over.

The children of the first marriage contended that Harriet L. took a vested interest in the estate of her father; and that one-ninth of the property should be paid to her executor. The other children contended that her interest was contingent upon her surviving the widow of the testator.

A. D. Foster, for children of the first marriage.

E. H. Bennett, for children of the second marriage.

O. ALLEN, J. The only clause of the will under which any question arises, is the following: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." Other portions of the will are referred to merely as they may aid in showing the intention of the testator in using the above language.

While the meaning of the testator is certainly open to some doubt, which has been shown with much ingenuity and force in the argument, we are of the opinion, on the whole, that the case falls within the general rule, that a vested remainder will be held to have been intended, in the case of a devise to the testator's children, unless there is something sufficient to show the contrary. There are no words of contingency as to the

children who shall take. The devise is general, to the testator's children, the issue of a deceased child standing in the place of the parent. The will does not say that the estate shall go to his children then surviving, or make any provision that the interest of any one of them shall cease in case of his or her death. In the devise, the meaning of which is immediately under consideration, the testator does not even insert the word "then;" that is, that "the estate shall then go to and be equally divided among my children." This word is only used in the earlier clause, providing that such articles of furniture, and other specific articles, as are not consumed in the use, and shall remain in existence at his wife's marriage or death, shall then go to his children. But in all the cases referred to in the argument where stress was laid upon such a use of the word "then," as showing that the remainder was to be held contingent rather than vested, it was accompanied with words of survivorship; as in *Olney v. Hull*, 21 Pick. 311, where the words were, "should my wife marry or die, the land then shall be equally divided among my surviving sons;" in *Thomson v. Ludington*, 104 Mass. 198, where the remainder was given "to such of my children as shall then be living;" and in *Smith v. Rice*, 130 Mass. 441. The argument from the use of the word "then" in the earlier clause does not materially aid in the consideration of the meaning of the clause immediately to be determined, and it is certainly open to much doubt whether the earlier clause would not bear the same meaning if the word "then" were omitted. In *Denny v. Kettell*, 135 Mass. 138, the word "then" was not inserted, but the words were, "all the residue of said trust fund, in equal portions, to my surviving nephews and nieces." These being plain words of survivorship, the only question was to what period of time they should be referred; and it was held, in view of all the phraseology of the will, that they should be referred to the period of distribution. That decision throws no light upon the present case, which falls rather within the rules favoring vested remainders, as declared in *Blanchard v. Blanchard*, 1 Allen, 223, and *Abbott v. Bradstreet*, 3 Allen, 587.

An argument in favor of contingency is drawn from the use of the words, "the issue of a deceased child standing in the place of the parent." It is urged that such issue, if there were any, would take at all events; that the parent could not have disposed of his or her share, to their exclusion; and that, therefore, the interest of the parent was not an absolute vested one. It is contended, on the other hand, that the interest of Harriet was a vested remainder, subject only to be divested by her death in the lifetime of her mother, leaving issue. It is true that there may be such a thing as a vested interest which is determinable upon the happening of a contingency. (*Blanchard v. Blanchard*, *ubi supra*.) But in the present case we do not find it necessary to consider whether Harriet's interest was liable to be divested by the birth and survivorship of issue, or not. It is quite as natural and probable to infer that the words above quoted were used for the purpose of showing clearly that the testator did not intend the devise to lapse, in the case of the death of one of his children, leaving issue. Words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills, when, strictly speaking, they are entirely unnecessary; and the use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised. (*Pike v. Stephenson*, 99 Mass. 188; *Darling v. Blanchard*, 109 Mass. 176; *McArthur v. Scott*, 113 U. S. 340, 381; 1 Jarm. on Wills [5th ed. by Bigelow], 870.)

It is further contended, that, inasmuch as the gift in the will embraces personal as well as real estate, it ought more readily to be inferred that the testator intended that his children should take only a contingent interest, and some of the earlier Massachusetts cases countenance this view. (*Dingley v. Dingley*, 5 Mass. 535; *Denny v. Allen*, 1 Pick. 147; *Emerson v. Cutler*, 14 Pick. 108, 115; *Rich v. Waters*, 22 Pick. 563.) In later cases, however, the above decisions have been overruled or questioned. (See *Wright v. Shaw*, 5 Cush. 56, 60; *Abbott v. Bradstreet*, 3 Allen, 590; *Bowditch v. Andrew*,

8 Allen, 339, 342.) And gifts over of real and personal property, at the expiration of widowhood, to the testator's children, have usually been held to convey a present vested interest to the children.

On the whole, looking at all parts of the will—considering the repetition, in a later portion, of substantially the same idea in different phraseology—in view of the entire absence, in either of these provisions, of any words of contingency, such as “my children then surviving,” and of the fact that nothing was wanting to put the children in full possession except the mere efflux of time—regarding also the provision that, in case of the remarriage of the testator's wife, the bulk of the income of both real and personal estate was at once to go to his children—we are brought to the conclusion that the children took vested interests; and that the share of Harriet L. Gibbens passed by her will. (See also *Poor v. Considine*, 6 Wall. 458; *McArthur v. Scott*, 113 U. S. 375; *Parker v. Converse*, 5 Gray, 336.)

Decree accordingly.

OSGOOD vs. BLISS.

[141 Massachusetts, 474.]

ANTE-NUPTIAL AGREEMENT.—REVOCATION OF THE WILL OF AN UNMARRIED WOMAN BY HER SUBSEQUENT MARRIAGE.

An unmarried woman executed a will; and, on the same day, she and her intended husband entered into an ante-nuptial agreement, providing that she should retain absolute control of all her property after marriage; that she should have full and unrestrained right to dispose of the same; that, at her death, such property should descend according to the terms of a will executed prior to the marriage, free from all legal right of her husband; and that the marriage should not work a revocation of the will, nor affect her right to alter the same during the marriage. On the next day the parties to the agreement were married, and lived together until her death, no issue hav-

ing been born of the marriage. *Held*, that the execution by the will of the power of appointment in the ante-nuptial agreement was not revoked by the marriage.

APPEAL, by Edward M. Bliss and Carrie F. Ormsby, from a decree of the Probate Court, admitting to probate the will of Elizabeth A. Heywood. The case was submitted, and reserved for the consideration of the full court, upon agreed facts, in substance as follows:

Elizabeth A. Heywood, being unmarried, and a resident of Indianapolis, in the State of Indiana, on January 25, 1882, at said Indianapolis, duly executed the will offered for probate.

On the same day, said Elizabeth and Edward M. Bliss, a resident of Worcester, in this commonwealth, at said Indianapolis, entered into the following agreement:

"This agreement, made and entered into this twenty-fifth day of January, 1882, between Elizabeth A. Heywood, of the city of Indianapolis and State of Indiana, and Edward M. Bliss, of Worcester in the State of Massachusetts—

"Witnesseth, that, in consideration of the promise and agreement of said Elizabeth A. Heywood to marry the said Edward M. Bliss, and of the said Edward M. Bliss to marry the said Elizabeth A. Heywood, it is hereby mutually agreed and stipulated that the said Elizabeth A. Heywood shall own, possess, hold, and control absolutely all property which may belong to her at the time of such contemplated marriage, or which she may afterwards acquire in any manner, the same as if she were an unmarried person, free from all authority, right or control of the said Edward M. Bliss; and shall have full and unrestrained right to dispose of the same; and at her death such property shall descend according to the terms and provisions of the will and testament of Elizabeth A. Heywood, free from all legal right of Edward M. Bliss as her husband.

"And it is further agreed that such marriage shall not work a revocation of the will and testament of Elizabeth A. Heywood, executed prior to said marriage, nor affect her right to alter or change the same during such marriage.

"In witness whereof, the said Elizabeth A. Heywood and Edward M. Bliss have hereunto set their hands and seals this twenty-fifth day of January, 1882."

The parties to said agreement were married on the next day after the agreement was executed, at Indianapolis, and immediately removed to Worcester, where they resided until the death of said Elizabeth, on March 15, 1884, no issue having been born of said marriage. Said Elizabeth had, in the meantime, made no other will, and no codicil to the one offered in this case.

Edward M. Bliss had no knowledge of the execution of said will, or of its contents or existence, until after the decease of said Elizabeth, beyond the reference to a will contained in said agreement.

The will and agreement were left by the deceased, without the knowledge of said Edward M., in the hands of the appellee, at Indianapolis, at the time of their execution, and were never thereafter in her possession.

The appellant, Edward M. Bliss is interested in the estate of said Elizabeth as her husband, and the appellant Carrie F. Ormsby as one of the next of kin.

At the time of said marriage, the statutes of Indiana provided as follows: "After the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage."

Said Elizabeth died possessed of about \$12,000 in personal property and \$500 in real estate, all of which belonged to her at the time of executing said will and agreement, excepting what may have been added by accumulations of income not expended, and by increase in value.

F. P. Goulding and H. F. Harris, for the appellee.

H. C. Hartwell and F. H. Dewey, Jr., for the appellants.

W. ALLEN, J. No question is made that the agreement contained a power to Mrs. Bliss to appoint by will, and that a will executed by her after the marriage would have been a

good execution of the power, and would have operated as such, and not as a will; and that, to make it effective, it would be necessary that it should be allowed in the Probate Court. (See *Osgood v. Breed*, 12 Mass. 525; *Ela v. Edwards*, 16 Gray, 91; *Heath v. Withington*, 6 Cush. 497; *Holman v. Perry*, 4 Met. 492; *Parker v. Parker*, 11 Cush. 519.)

Whether a power of appointment in an ante-nuptial contract can be executed before, as well as after, the marriage, depends upon the terms and construction of the agreement. In this case, the power to appoint by will before the marriage is clearly given. The provision that the marriage shall not work the revocation of the will executed prior to it shows that it was intended that the power might be executed before the marriage. The agreement and the will bear the same date, and were both executed on the day before the marriage, and the agreement provided, in effect, that 'the will should be a good execution of the power. Even if the will had been made before the agreement, and not referred to in it, and the power had been general to appoint by will, the pre-existing will might have been a good execution of the power. (*Boyes v. Cook*, 14 Ch. D. 53; *Logan v. Bell*, 1 C. B. 872.) The question is whether the execution of the power by an appointment by will before the marriage was revoked by the marriage.

The difference between a will and an appointment by will in this case may seem very slight, but there is the material practical difference between the two, that a married woman may make an appointment by will by the common law, but cannot make a will except as authorized by recent statutes. The theoretical distinction is, that a will concerns the estate of the testator, and an appointment under a power that of the donor of the power. It is the exercise of the power of designation as to the estate of the donor, and is the same when given or reserved to the wife, as to her own estate, in an ante-nuptial contract between the parties intending marriage. (*Ela v. Edwards*, *ubi supra*; *Bradish v. Gibbs*, 3 Johns. Ch. 523.) Such a power can be given to be executed when sole or married, and can be executed by a married woman according

to its terms, by deed, will, or otherwise. There can be no reason for the distinction that the execution, when sole, of a power to appoint by deed or will when sole or married, if by will should be revoked by marriage, but if by deed should not be revoked. The will operates in the same manner as the deed does, as the execution of a power, not as the disposition of an estate. It was at first held that the will could not be proved in the spiritual court, but treated in equity as an appointment. The difference between the execution of a power by will and by deed is, that the former must be by an instrument allowed in the Probate Court as executed in the manner of a will, and which is to be construed by the rules applicable to the construction of wills, and such an appointment is always revocable; the latter must be by an instrument under seal, and may be irrevocable.

The reason given for holding that marriage is deemed to be a revocation of a woman's will—that she thereby divests herself of the power of revoking it, and destroys the ambulatory character necessary to a will—does not apply to an appointment by will. The woman has the same authority to execute the power of revocation and appointment when married as when sole. The nature, and not the form, of the instrument, determines whether, at common law or under statutes, it is a will of which marriage is a revocation. So are the authorities.

In *Hodsen v. Staple* (2 T. R. 684), there was an ante-nuptial agreement between the parties to a marriage, by which the woman had a power of appointment of her real estate by will. Before the marriage she made a will in favor of the man. The husband survived her, and the question arose between their respective heirs in an action of ejectment. The case was decided in favor of the heirs of the wife, on the ground that the legal title remained in her, and did not pass by the will. Lord Kenyon, C. J., said, that, while the will of a *feme sole* is revoked by marriage, "it is equally clear that, where an estate is limited to uses, and a power is given to a *feme covert* before marriage to declare those uses, such limitations of uses may take effect; and this is the rule even in a court of law."

Ashhurst, J., expressed a doubt whether marriage would not revoke the will, but said that that question did not arise in the case, as the power did not give authority to appoint before marriage. *Hodsdon v. Lloyd* (2 Bro. Ch. 534) was in equity, and the question of the validity of the same will as an execution of the power was directly in issue. It was held invalid, because the power was limited to a will made after marriage, and not upon the ground that the marriage was a revocation of the appointment.

In *Taylor v. Rains* (7 Mod. 148) there was an agreement between persons intending marriage, which gave the woman power to appoint in writing or by will. She made a will before the marriage. It was held that, though the will could not be allowed in the spiritual court, it was a good appointment in equity.

Logan v. Bell (*ubi supra*) was a case of a marriage settlement, which gave the woman a power of appointment by deed, will, or codicil. After the settlement, but before the marriage, she made a codicil to her will, referring to the power. It was held a valid execution of the power, and not revoked by the marriage. Tindal, C. J., said : "Nor is there any doubt that, supposing the power in the settlement to extend to a codicil made after the settlement and before the marriage, the appointment by the codicil was not revoked by the marriage." There seems, therefore, to be no doubt that a power to appoint by a codicil made before marriage may, by proper words, lawfully be conferred, and may, if duly executed, take effect notwithstanding the subsequent marriage.

McMahon v. Allen (4 E. D. Smith, 519) was a case where a power in a marriage settlement to appoint by writing or by a last will or codicil contained these words : "The existing will and codicil to be deemed an appointment until the making of some other appointment." It was held that the will and codicil was a valid execution of the power, which was not revoked by the marriage. (See also *Lant's Appeal*, 95 Penn. St. 279.)

The will, so far as it is in execution of the power of appointment contained in the agreement referred to, should be

allowed; but there should be a qualified or limited allowance, as in *Holman v. Perry* and *Heath v. Withington, ubi supra*.

Ordered accordingly.

FARNAM vs. FARNAM.

[58 Connecticut, 261.]

BEQUESTS TO CHILDREN AND GRANDCHILDREN.—PERPETUITIES.—TRUSTS.—AFTER-BORN CHILDREN.

A bequest of money in trust, to pay a portion of the net income to specified beneficiaries, the remainder of the income to accumulate for ten years after the testator's death, and the estate all to go ultimately to the testator's grandchildren, created a vested interest for such of the grandchildren as were living at the death of the testator. Such a disposition of property is not in conflict with the statute against perpetuities.

SUIT for the construction of a will.

L. H. Bristol, for plaintiffs.

C. R. Ingersoll, for heirs at law.

J. W. Alling and *S. C. Loomis*, for grandchildren.

CARPENTER, J. The testator's will contains the following articles :

"*Fourth*. All the rest and residue of my estate of every kind, and wherever situated, I give, devise, and bequeath to my wife, Ann Sophia Farnam, and my children, George Bronson Farnam, William Whitmore Farnam, Charles Henry Farnam, Sarah Sheffield Farnam, wife of Eli Whitney, Jr., and Henry Walcott Farnam, and to the survivors and survivor of them, as joint tenants in fee simple, but in trust for the uses and purposes following, to wit :

"1st. Out of the net income and profits thereof to pay to my said wife, Ann Sophia Farnam, during her life, the sum

of twenty-five thousand dollars annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease. This bequest and that contained in the second article of this will are in lieu of her right of dower in my estate.

"2d. The said trustees are, out of said net annual income, to pay to each of my children during their lives respectively, the sum of five thousand dollars annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease.

"3d. The said trustees are, out of said net annual income, to pay to each of my grandchildren as and when he or she shall arrive at the age of twenty-one years, the sum of five thousand dollars.

"4th. During the ten years next succeeding my decease, the said trustees shall allow the said net annual income to accumulate (subject always to the payment of said annuities to my said wife, and to my said children, and also to any payments to any grandchildren as aforesaid), and invest the same as part of said trust estate; and said trustees after the expiration of said ten years shall pay two thirds of the net annual income of said estate, annually, to my children then surviving, in equal proportions; and if any of my said children shall have then deceased, his or her legal representatives shall be entitled to the share of said annual income that he or she would have been entitled to if living; and said trustees shall allow the remaining one third of said net annual income to accumulate, and invest the same as part of said trust estate.

"*Fifth.* At the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease; and I give, devise, and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living, to be equally divided among them *per capita* and not *per stirpes*, and to their heirs forever; but if any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her, or their parent would have been en-

titled to if living ; and if any grandchild of mine shall have died leaving a widow surviving at the expiration of said trust, but leaving no child or children then surviving, such widow shall take one third of the share her husband would have been entitled to if living."

In the construction of this will several questions have arisen. It is claimed by the children of the testator that the fourth and fifth articles are inoperative, or substantially so, for the reason that they are in violation of the statute against perpetuities. This claim, if sustained, requires us to hold—1st, that no estate vests in the grandchildren until the death of the widow and all the children ; and 2d, that it will then vest in a class composed of grandchildren then living and the children and widows of deceased grandchildren. The main question is, whether the estate in the grandchildren is a vested or contingent remainder. We use the terms "vested remainder" and "contingent remainder" as they have been frequently used in this State, as applicable alike to real and personal property. We do not deem it necessary in this case to make any distinction between the two kinds of property.

When, by the terms of this will, does the estate vest in the grandchildren ? At the death of the testator, or at the death of the last survivor of his wife and children ?

We think it vested in point of right on the death of the testator.

That courts will incline in doubtful cases to construe a devise or legacy as vested rather than contingent is a familiar and well settled rule. In some instances courts seem to have gone so far as to say that they will, if possible, construe it as vested. It is enough for our present purpose to say that we ought to give this will that construction if its language will fairly admit of it.

The bequest is not in terms contingent, nor is it so by necessary implication. That it may be so construed may be conceded. That it will bear a different construction, and that that is the better one, we shall attempt to show.

It will be noticed that the testator, as to the great bulk of his property, separates the legal from the equitable title ; and

that separation is to continue until the death of his widow and children. The naked legal title is vested in trustees; the equitable title to the principal, and a large part of the income is vested in no one until the termination of the trust, unless it vests in the grandchildren. The testator has made no other disposition of it. The law will not favor a construction which suspends the title or holds it in abeyance.

That the testator intended that the grandchildren should ultimately have the property cannot be doubted. That he has not expressly postponed the vesting is equally clear. The doubt arises from the use of the word "then," referring to the time when the trust shall cease, in the fifth article—"I give, devise, and bequeath all the estate which shall *then* be held in trust under this will to my grandchildren who shall *then* be living."

It is contended, on the one hand, that the word, as first used, is used to indicate the time when the estate is to vest in point of right; on the other hand, it is insisted that it merely indicates the time when it is to vest in possession. It is agreed that it points out the time when the legal and equitable titles merge, and when the estate is to be distributed; and we think it must be conceded that the connection in which it is used does not necessarily require us to say that it is used for the further purpose of indicating the time when the estate vests in point of right. But if it is left in doubt, the rule referred to makes it a vested estate.

The word as used in the last clause does not refer to the estate, nor to the time of its vesting, but is used to designate the persons who are to take, and will be further noticed when we consider that branch of the case.

Another rule is, that if the limitation over depends upon an event which is sure to happen, and the persons who are to take can be ascertained during the continuance of the particular estate, the interest is vested. But if it depends upon an event which may or may not happen, or if it is uncertain whether any person will ever be in existence who can take, the estate is contingent.

Mr. Redfield states the rule thus: "From a careful exami-

nation of the subject it will be found, we think, that the question of vesting or remaining contingent depends upon whether the conditions of the intervening estate determining and the estate over taking effect, is one that must happen some time, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested." (Redfield on Wills, pt. 2d, p. 594.) Again: "A conditional bequest is where its taking effect depends upon the happening of some uncertain event." (Id. p. 661, citing 2 Wms. on Exrs. 1132, and 1 Roper on Legacies, 605.)

The rule thus unqualifiedly stated makes this a vested remainder. The event on which the remainder is to take effect—the death of all the trustees—is sure to happen. Assuming that the grandchildren as a class, and they only, take the remainder—a question we shall hereafter consider—there is no difficulty in ascertaining at any time who are to take. The remainder is certain to vest at some time, and a certain definite class is designated to take. Under these circumstances the law presumes that the testator intended that the remainder should vest presently. There is a present right of future enjoyment whenever the possession becomes vacant; and that right, coupled with the fact that the time for the enjoyment must come, clearly shows a vested interest.

Mr. Jarman's fourteenth rule is as follows: "That the rule of construction cannot be strained to bring a devise within the rules of law; but it seems that where the will admits of two constructions, that is to be preferred which will render it vested." If this remainder is vested, the statute against perpetuities will not defeat it. Otherwise it may. To defeat this will we are obliged to interpret two of its provisions, concerning which the most that can be said is that they are doubtful and susceptible of a different interpretation, so as to make it invalid. In other words, we are required to give the benefit of all doubts to those attacking the will, and that for the purpose of destroying it; which is contrary to the rule.

The words, "I give, devise, and bequeath," import a present interest unless other provisions in the will clearly manifest

a different intention. "When the will imports a present interest in the devisee, it is to be construed so that any condition in the same shall be held subsequent and not precedent." (Redfield on Wills, part 2, p. 685.)

"The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving at age or surviving some other person, or the like." (*Everitt v. Everitt*, 29 N. Y. 89.)

It cannot be denied that the testator has used language importing an immediate gift in point of right; and we fail to discover in other parts of the will sufficient indications of a contrary intent.

Another rule—of less weight, perhaps, but still worthy of notice—is that when the only gift is in a direction to pay at a future time, and the will does not otherwise indicate a present gift, the remainder will generally be regarded as contingent. But where the terms of a bequest import a gift, and *also* a direction to pay at a subsequent time, the legacy vests at the death of the testator and not at the time of payment. (*Traver v. Schell*, 20 N. Y. 89; *Manice v. Manice*, 43 Id. 303.) Here are words importing a present gift, and also a direction to distribute at a future time.

Two cases in the State of New York will serve to illustrate and define this rule. One is that of *Warner v. Durant*, 76 N. Y. 133. In this case the will gave to the executor in trust certain money, with directions to pay to B. annually the interest on \$15,000 at seven per cent., and at the expiration of five years to pay over to B. the principal sum of \$15,000. B. died before the time fixed for the payment of the principal. The question was whether the legacy vested in B. during his life. The court say: "It is a general principle that when the gift is absolute, and the time of payment only postponed, time not being of the substance of the gift, but relating only to the payment, it does not suspend the gift, but merely defers the payment. This principle will not act in this case to vest the legacy; for the gift was not, in the outset, to the legatee; and

another rule is to be noticed. It is this: Where there is no gift but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. Here the gift was at first to executors to hold in trust for five years; and at the expiration of that period to pay over to the legatee. But this rule does not act in this case, for there has been a distinction grafted upon it. It is this: When the gift is to be severed *instantly* from the general estate for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed." And on that ground it was held that the principal sum of \$15,000 was severed from the general estate and vested in the legatee at the death of the testator.

In *Smith v. Edwards* (88 N. Y. 92), there were no words in the will importing a present gift, but the legacy depended entirely upon a direction to the executor to pay over to the legatee a legacy at a future time. It was held that the legacy was contingent, and did not vest until the time of payment. The court say: "Where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift. (1 Jarman on Wills, 762.) If that rule is arbitrary and inflexible, it ends any further argument; for in the present case there was no immediate gift, made in distinct terms, separate and apart from the direction to divide and distribute. But while we have recognized the rule, it has been with very important qualifications and exceptions which properly limit its force as a standard of construction. In *Manice v. Manice* (43 N. Y. 369) it was said that when the terms of a bequest import a gift, and also a direction to pay at a subsequent time, the legacy vests, and will not lapse by the death of the legatee before the time of payment has arrived. And in *Warner v. Durant* (*supra*) the general rule is declared to have an exception grafted upon it, that where the gift is to be severed *in-*

stanter from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed. The doctrine of these cases confines the rule within the limitation of its precise terms. It applies only where, beyond the direction for future distribution, there are no words and no provisions which import a present or vested gift, or indicate such an intent. It does not control where the language of the will, while not expressly saying 'I give and bequeath,' does yet plainly import a present gift intended to vest immediately without reference to the clause of distribution."

Smith v. Edwards was quoted approvingly by this court in *Wheeler v. Fellowes* (52 Conn. 238); and it is an authority which supports that decision as well as this, for an examination of the whole will in *Wheeler v. Fellowes* reveals this fact, that the gift over, which was held to be void, was found only in the direction to pay or divide at a future time. The question whether other provisions of the will indicated a present gift, and the question whether the remainder was vested or contingent, were not made and were not considered by the court. It was assumed by the counsel and the court that the remainder was contingent.

But we do not propose to decide this question wholly or principally upon legal and artificial rules. Those rules should never control the intention of the testator; they should only be used as aids in discovering that intention. In this as in other cases we should rely mainly on the language of the will itself. In doing so we must consider the terms of the whole will, having due regard to the condition and circumstances of the testator. It is to be observed that it is drawn with great care and technical accuracy.

Taking the whole will together, we think it is reasonably certain that the testator intended that his estate should vest in right, at once, in his grandchildren.

His general scheme is clear. In the first place he made ample provision for his widow; in the second place he made

reasonable provision for his children ; and in the third place he gave most of his property ultimately to his grandchildren. Secondary and incidental intentions may also be noticed. As to the great bulk of his property, he intended to pass by his children—that they should not have the absolute ownership of it. He also intended to keep it together, and have it accumulate as long as the rules of law would allow. Perhaps he was ambitious to live in his estate long after his death, and that the estate, when finally distributed, should be a very large one. Whether these purposes were wise or not it is not for us to say.

His disposition of his property seems to be an impartial one. But principally and prominently it appears that his grandchildren were the preferred objects of his bounty. His intention that they should ultimately receive by far the larger portion of his property is unmistakable. That is one of the leading features of the will. Now, as a vested interest is better than a contingent one, it will not be presumed that he intended the latter, especially as no one is benefited by it ; and if he did so intend, it threatens the practical destruction of the will. Every presumption is in favor of a vested interest ; not only so, but the inference to be drawn from the manifest intention of the will points strongly to that conclusion.

Let us now examine the will more in detail.

In the third article he gives, upon the death of his wife, to each of his surviving children, five pictures, and his silverware and plate, and prescribes the method of distribution. His language is : “ Upon the death of my said wife I give and bequeath to each of my three surviving children,” &c. Of course no question of perpetuity can arise in respect to these bequests ; but the question whether the children took a vested or contingent interest is a pertinent one. That they took a vested interest will hardly be doubted. The use of the pictures and silverware is given to the widow during life. The title to the remainder meanwhile is in no one unless it is in the children. It is no part of the trust estate, because it is to be distributed, in all human probability, long before the trust will terminate. As the title must vest in some one, and as the

children are ultimately to have it, the law vests it at once in them.

The condition here implied is clearly a condition subsequent. Surviving the widow is not the condition on which the estate vests, but death during her lifetime is the condition on which it divests.

Now, the language of the devises and bequests in the fifth article is similar to, and substantially identical with, the language in the third article, and must receive the same construction. If one gives a contingent estate, the other does; if one gives a vested interest, both do.

The fact that the net income, subject to the annuities, for ten years, and one third of it afterwards, is ultimately given to those who take the remainder, is some evidence that the testator intended a present interest, in analogy to the principle of those cases which hold that payment of the income to the remainderman during the prior estate, indicates an intention to vest the remainder.

But aside from all collateral and indirect considerations, the language of the fifth article, when properly interpreted, gives a vested interest. "At the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease; and I give, devise, and bequeath all the estate which shall then be held in trust under this will, to my grandchildren who shall then be living," &c.

The grammatical as well as the legal import of the words, "I give, devise, and bequeath," gives a vested interest. The death of the last survivor of the trustees refers not to the time of vesting but to the time for the trust to cease. The words are not to be carried over so as to qualify the words of the gift. They are not repeated in connection with the gift, nor even referred to by the use of the adverb *then*, as they might have been—"I *then* give, devise," &c.—but all reference to them is omitted, the sentence is complete, and it conveys to the professional mind a distinct and unequivocal legal meaning, a present gift. Time is in no sense attached to its substance.

Later in the sentence the word *then* is used—"all the es-

tate which shall *then* be held in trust." But it is there used for the purpose, not of indicating the time when the estate is to vest, but for the purpose of pointing out the subject of the gift. The amount of the trust property is constantly increasing, and the nature and kind of property are liable to frequent changes. The design was to give *now* the property which may *then* exist.

Such changes and accumulations do not affect the *corpus*, so as to prevent the remainder from vesting. They are frequently, we may say generally, incident to trust estates, but they do not affect the title of the remainder.

The word "then" is again used in this connection: "to my grandchildren who shall *then* be living." It is here used to point out the persons who are to take and not to indicate the time when the estate is to vest.

But it is said that the persons who are to take are the grandchildren then living, and that until that time arrives there is necessarily an uncertainty as to the legatees; and that this uncertainty makes the gift contingent. There would be more force in this reasoning if the testator's intent is to be inferred from this sentence alone. But the testator was careful to explain his meaning, for he adds: "But if any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her, or their parent would have been entitled to if living." And then follows a provision in favor of the widow, if a grandchild died leaving a widow and no children.

Taking the whole article together, it is apparent that the testator intended that an interest should vest in each grandchild, and that the distribution should be on that theory.

But it is insisted that if the interest vested it would descend by the statute of distribution to the widows and children, so that there was no occasion for the testator to provide for it; and that the fact that he did so is an indication that the estate does not vest. There is little force in this argument, for it frequently happens that property is disposed of in wills according to the statute. Besides, in this case the statute is not pre-

cisely followed ; for if there are children the widow is excluded ; and if there is a widow and no children, she takes one third instead of one half, as she would by statute.

By "my grandchildren then living" the testator evidently had in mind after-born grandchildren. His reasoning was this—I desire to give this property to my grandchildren ; but if I say so, and say no more, it may be claimed that only those now living will take. But I do not mean that, and so for the purpose of including after-born grandchildren I will give it to those then living. He then discovers that the children of deceased grandchildren are excluded, and makes separate provision for them.

Thus it seems quite clear to us that the estate vested in the grandchildren as a class, opening to take in those subsequently born. Each grandchild then living, and each grandchild subsequently born, as he came into being, took an interest in the estate and a right to share in its distribution. That right and that interest can only be defeated by his decease during the continuance of the trust, leaving no widow and no children ; and that is clearly a condition subsequent.

We cannot assent to the views urged by the counsel for the children, that there is but one class to take under the final distribution, and that that class is composed of grandchildren then living and children and widows of deceased grandchildren. Assuming all the provisions of the will to be operative, the grandchildren take equal shares *per capita* ; all the children of a deceased grandchild, no matter how many, take but one share *per stirpes* ; while each widow is entitled only to the fraction of a share. We are unable to comprehend how all these legatees, of different grades, and taking as they do in different proportions, can be regarded as a single class. They are such only in one sense—they constitute all the beneficiaries. But that is not what is meant by a class gift. Ordinarily, a class is where several persons answering the same description sustain the same relation to the legacy.

In this case the whole property is given to the grandchildren. One word describes them all. Each takes one equal

share in the property; each takes originally, and not by way of substitution or derivatively; and each takes absolutely.

On the contrary, the children of a deceased grandchild are to take contingently; they take derivatively and not primarily; they represent a deceased grandchild, and together take but one share; they do not answer the same description; and their relations to the legacy are entirely different. So also with the widows; with this further suggestion, that they take severally and not collectively.

It seems to us that the first and primary class consists of grandchildren only. If all should live until the expiration of the trust, as is possible, they will take the whole estate, and great-grandchildren and widows will be excluded. Clearly, then, all cannot be embraced in one class. Contingently, great-grandchildren may take, but as they take *per stirpes*, they cannot take as one class. There must be as many classes as there are deceased grandchildren leaving children. Each class takes, not directly from the original property, but from a severed portion thereof. Each class therefore is distinct from and independent of the others.

The widows cannot be regarded as a class at all, as each takes independently of the others. They, too, do not take from the general legacy, the whole trust property, but each shares in a portion of it after it has been severed from the common fund. The share of each grandchild is distinct from the others, and becomes the subject of another division. Each widow is only interested in one share; she is a stranger to the others. And so the widows and great-grandchildren are to share, not in the original distribution, but in a sub-distribution.

It would seem to follow from these considerations that each class of great-grandchildren must stand by itself, and that the gift to it may or may not be void under the statute against perpetuities; a question we refrain from deciding. Inasmuch as that question has not been fully discussed, we think best to leave it to be determined hereafter. We apprehend, however, that it is not a question of very great practical importance, because the interest being vested in the grandchildren, their

children and widows will take under the statute of distribution ; and that may be quite as well for all concerned.

We also deem it inexpedient to consider whether this will, or any part of it, is inoperative under the statute of New York. That is a question which must ultimately be determined by the courts of that State.

Another question is, whether in case of the death of a child of the testator at any time within the period of ten years, the annuity of five thousand dollars given to such child would be payable to that child's legal representatives or heirs for the remainder of the ten years, and if so, to what representatives ?

The language of the second clause of the fourth article, construed by itself, would seem to require a negative answer ; but taking it in connection with the other parts of the will, we think the answer would be in the affirmative. A leading feature of the will is equality or impartiality. The testator's scheme studiously provides for equality among the children, and also among the grandchildren. If a child dies, leaving children, that equality will be seriously impaired unless the annuity is continued to his heirs.

The children of a deceased child are expressly put in the place of their parent in respect to two thirds of the net income after the expiration of the ten years. It would be strange if he intended that they should be upon a different footing for the time that might elapse between the death of a child and the expiration of the ten years in respect to the annuity.

Again : The testator, in providing for the accumulation of the net income, has taken pains to say that all the annuities shall first be paid from it. That is some indication that he intended that all the annuities should be paid for the whole period of ten years.

These annuities are manifestly given for present maintenance. We cannot presume that the testator would have deliberately cut off the family of a child from all participation in the estate upon the child's death. He has not done so expressly, and we are not disposed to do so by implication.

We think it may fairly be inferred from the general tenor of the will, considering all its provisions in the light of the attending circumstances, that the testator intended that the annuity should be continued to the heirs of a deceased child ; and it seems to follow logically that it should be paid as long as the trust continues.

The gift of two thirds of the net income to each child is in addition to the annuity. The legacies are distinct, differing in character and amount, and both are given without qualification. Had it been intended that the latter should be substituted for the former, the testator would have said so. Instead of that, he has expressly provided that the former, the annuity, shall be for life, and we fail to discover any indications of an intention that it shall cease at the end of ten years. Two different legacies will be presumed to be cumulative in the absence of any direction to the contrary.

The term, "legal representatives," in the fourth clause of the fourth article, is not to be taken in a technical sense. It was obviously the intention of the testator to provide for the family of the deceased child. That intention will be best effectuated by construing the words as meaning the heirs and widow—they being the ones to take under the statute of distribution. Both parties substantially agree in that construction, and the will seems to justify it.

In respect to the last three points considered, the will leaving each of them somewhat in doubt, we have endeavored to follow, as nearly as may be, the statute of distribution, believing that the will will bear that interpretation as well or better than any other, and that it will make the will more harmonious and consistent as a whole.

The Superior Court is advised as follows :

1. That the grandchildren take a vested interest in the remainder of the trust property ; and that they take as a class, opening to let in after-born grandchildren, and in case of the death of any one before distribution without children and leaving no widow, his title divests. Consequently no part of the estate is intestate by reason of the statute against perpetuities.

2. We deem it unnecessary now to determine whether great-grandchildren and the widows of grandchildren in any given case can take under the will.

3. We also deem it inexpedient to consider whether any part of the will is rendered inoperative by the laws of New York.

4. The annuity to children is payable to the family of a deceased child during the continuance of the trust.

5. The gift of two thirds of the net income after the first ten years is cumulative.

6. By "legal representatives" is meant those who would take under the statute of distribution.

In this opinion GRANGER and STODDARD, JJ., concurred.

PARK, C. J. (dissenting). I cannot concur in the views expressed by the majority of the court in regard to the disposition of the principal of the estate contained in the fifth clause of the will in question. The majority hold that the principal vested by right in the grandchildren of the testator, as a class, at the time of the testator's death.

I think no estate in the principal could vest by the terms of the will before the death of the last survivor of the testator's children, and, if Mrs. Farnam should then be living, not before her death.

Although the testator had nearly two million dollars of property to bequeath to his wife, children, and grandchildren, still, not contented with dividing this enormous estate among them, he conceived and cherished the scheme of doubling the amount before any disposition of the principal should be made. This he sought to accomplish after his death by adding to the principal of his estate a large proportion of its yearly income till the death of the last survivor of his wife and children.

The testator was in the seventy-ninth year of his age when the will was made. He had five children then living, the eldest of whom was forty-one, and the youngest twenty-nine. It was highly probable, almost certain, that some one of them

would live to be as old as himself—would live at least forty years after his death.

Such being the case, the testator must have expected that his great estate would, and therefore intended that it should, accumulate forty years at least before the time would arrive for the termination of the trust, and before the words "I give, devise, and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living," would take effect.

I am wholly unable to see how it is possible for these words to convey, at the death of the testator, the beneficial interest in the principal of the estate, as the majority of the court hold. It seems to me the testator labored to make it clear, beyond the possibility of a doubt, that the time when the bequest would take effect was when the trust should terminate at the death of the last survivor of his wife and children. Up to this time he had devised and bequeathed the legal estate in fee simple to his trustees by a previous clause in the will, and now, on the death of "the last survivor," &c., he declares that the legal estate in fee simple which he had transferred to the trustees shall terminate, and then he devises and bequeaths the entire estate, legal and equitable, in fee simple to his grandchildren who shall then be living, &c.

For greater precision, and seemingly to put the matter beyond all doubt, he repeats the word *then*, or its equivalent, a number of times. "At the decease, &c., this trust shall cease;" "at the decease, &c., I give." The word *and*, between *cease* and *give*, is used to supply the words "at the decease," &c., and save a repetition of them. "And" always signifies an addition to what precedes. The testator says: "At the decease of the last survivor, &c., this trust shall cease." But this is not all that shall then take place. The testator goes on to say "and" (that is, in addition to my putting an end to the trust), "I give," &c. Hence, if we supply in words all that is understood by the word "then" and its equivalent, we shall have in the sentence expressing the gift the following: "At the decease, &c., this trust shall cease; at the decease, &c., I give all the estate, which at the decease,

&c., shall be held in trust under this will, to my grandchildren who shall, at the decease, &c., be living."

And further, by the terms of the will, manifestly the legal estate in the trustees did not pass, and could not have passed, to the grandchildren on the death of the testator. This is conceded. And it must further be conceded that on "the death of the last survivor," &c., it will, for the first time, pass to the grandchildren then living, by the words "I give, devise, and bequeath." These are the only words in the will that make any disposition of the principal estate to the grandchildren. And here they carry the entire estate in fee simple to such of the grandchildren as shall then be living, and to the living issue of those who shall then be dead. Is it possible that these words had the effect to transfer the equitable interest in the principal estate to the grandchildren on the death of the testator, when here, forty or fifty years afterwards, the same estate is clearly and unmistakably transferred to them, together with the legal estate?

Again, the testator, in the fifth clause of the will, places himself at the death-bed of the last survivor of his wife and children, and upon his or her death declares that all the object he had in view in trusteeing his property, in order that he might transmit to his descendants an enormous estate, has now been accomplished. He has no more need of trustees, and therefore he says, "the trust shall cease, and I give, devise, and bequeath all the estate" now held by the trustees to my grandchildren now living, "and to their heirs forever." He at that time, in legal contemplation, uttered the words of gift.

Again, the article we are considering goes on to say: "But if any grandchild of mine shall have died, leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her, or their parent would have been entitled to if living."

"Would have been entitled to if living" presupposes that his, her, or their parent had never been entitled to *the share*, owing to his death before the time when the shares are given by the will. These words show clearly that the testator never supposed that he had given to his grandchildren a vested

interest in his estate which would take effect at the time of his death. And, indeed, so to do might be ruinous to the scheme the testator had in view in trusteeing his property, which was, as we have seen, to transmit to his descendants a vast estate. A vested interest in the grandchildren could be alienated or attached for debt, and it might be that when the vast estate, with all its accumulations for many years, should be ready for distribution in the far future, strangers to the blood of the testator might come in and claim it. The testator had fourteen grandchildren living at the time of his death, the eldest of whom was but eleven years of age. During the forty or fifty years that the trusteeship in all probability would have to continue, their number would be doubled or trebled, while death in the meantime would remove some of them, and they would wait with great impatience for the time to arrive when they should come into possession of their estates; and many of them would become discouraged and sell their interests at any price for ready money, preferring to do so rather than wait till old age to get more, and in the mean time run their chances of dying and getting nothing. It would seem therefore that, to carry out the scheme of the testator to a successful termination, it was necessary to give to the grandchildren only a contingent interest, incapable of vesting. This the testator must have known, and in the making of his will acted with reference to it accordingly.

But it seems to me clear, from the language of the bequest, that the interests of the grandchildren in the principal estate of the testator are merely contingent. Their interests depend altogether upon the uncertain event of their being alive at the death of the last survivor. The gift is only to grandchildren *then* living. To be then living is essential to the right to receive any of the estate. It is a condition precedent. It distinguishes the grandchildren who will take from those who will not take. As well might a child of A. claim a bequest made to a child of B., as for a grandchild to claim under this bequest who was not then living. If the testator had said: "At the death of the last survivor of my wife and children I give, devise, and bequeath all my estate to my grandchildren," and

had stopped there, then, inasmuch as the description would apply to all the grandchildren, and the event on the happening of which they were to take was certain to occur at some time, it might be said that the grandchildren took vested interests in the principal estate at the death of the testator. The distinction between a vested and contingent interest is this. If the event is certain to happen on which the interest is made to depend, and the taker is certain, the interest is vested. But if the event is uncertain ever to occur, or the person to take is uncertain, then in either case the interest is contingent. This distinction is clearly stated in *Alfred v. Marks*, 49 Conn. 473.

It seems to me that here lies the error in the opinion given by the majority of the court. They treat the case as though there was no uncertainty in the persons to take, whereas the will leaves it wholly uncertain who will take the estate at the death of the last survivor, &c.

The fifth clause of the will provides as follows with regard to the children of the grandchildren: "If any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her, or their parent would have been entitled to if living." Here the will gives the share that would have come to the deceased parent, had he been living at the death of the last survivor, &c., directly to the child or children of such parent. The child or children take as purchasers, as much so as though they were the child or children of strangers. The phrase, "such child or children shall take the share that his, her, or their parent would have been entitled to if living," was used merely as descriptive of the interest they would take directly from the will as purchasers. They inherit nothing from their parent. He had nothing for them to inherit. This position does not admit of a question. Now, let us take the case of one grandchild, which will illustrate many cases that may occur. A. was born not long after the death of the testator. He grows up, marries, and has a child, B. B. grows up, marries, and has a child, C. Thus, three generations come into being after the death of the testator and

before the death of the last survivor, &c. They are all living. Who can tell to which of them the bequest will carry a portion of the principal estate, if eventually it will carry any to either of them? Manifestly it is all uncertain by the terms of the will whether either of them will take; much more which of them, if either. If A. happens to be alive at the death of the last survivor, &c., he will take. If A. is not then alive, but B. is, B. will take. If A. and B. are both dead, but C. is then living, C. will take. If all are then dead, none will take. It is the uncertainty of the taker that makes the interest in the grandchildren merely contingent—contingent from the death of the testator to the death of the last survivor, &c., when it will become vested in parties unascertainable before the time arrives.

It seems to me that this view of the case is fully supported by the authorities in this State and elsewhere. In the case of *Alfred v. Marks* (49 Conn. 473), a devise was made to M. in fee, coupled with a proviso that if he should die without children a portion of the property should go to the heirs of W. It was held that the heirs of W. took only a contingent interest. In the case of *Bristol v. Axtwater* (50 Conn. 404), an estate was left in trust for Mrs. Denman, remainder to her children in fee; but if she should leave no children, then the estate was given to the other children of the testator in equal shares, or to their issue, the children of such as were deceased, whether of children or grandchildren, to take the share which their deceased parent would have had. It was held that the interest in the other children of the testator was contingent till the death of Mrs. Denman. This case seems decisive of the one in question.

In the case of *Wheeler v. Fellowes* (52 Conn. 238), the testator gave his property to executors in trust for the payment of the income to his children during their lives, and when the youngest of the testator's grandchildren should arrive at the age of eighteen years, the principal of the trust estate was to be divided in fee equally among the grandchildren, "and if any of them shall have deceased, leaving children or other descendants, then such children or other descen-

dants shall take the share that would have belonged to his or her deceased parent or ancestor, had he or she then been living." The court held that the interest in the grandchildren or other descendants was contingent till the youngest grandchild should arrive at eighteen years of age. This case is strikingly like the one under consideration.

In the case of *Brown v. Williams* (5 R. I. 309), the devise was to trustees for the use of the testator's daughter M. for life, remainder to her issue, and if she died leaving no issue, then as follows: "I give and devise the aforesaid described lands and premises to the children of my daughter A., not only those who are now born but also those that may be born, to be equally divided between them, share and share alike, or to the issue of deceased children that shall be alive at the time of my daughter M.'s decease; the children of a deceased child to take the same share their parent, if living, would have taken, the which I do hereby give to them, their heirs and assigns forever." The court held that the interest of the children of A. and their issue was contingent till the death of M. This case is another strikingly like the one in question.

In the case of *Thomson v. Ludington* (104 Mass. 193), a testator by will gave his estate to his widow during her life or widowhood, and at her decease or marriage to such of his children as should then be living, share and share alike, to them and their heirs forever. One of the daughters of the testator survived him, but died before the death or marriage of the widow, leaving a son born in the lifetime of the testator. The court held that the deceased daughter of the testator had only a contingent interest that could not be inherited by the son.

In the case of *Hall v. Hall* (123 Mass. 120), a testator, whose daughter and her children survived him, by his will bequeathed a certain sum in trust to accumulate till his grandchildren respectively should attain the age of thirty-five years, when a proportionate part of the fund and accumulation, divided by the number of grandchildren then living, should be paid over to each of them. It was held by the court that under this bequest the grandchildren of the testator took only contingent

interests, which could not vest till the grandchildren respectively arrived at the age of thirty-five years.

In the case of *Colby v. Duncan* (139 Mass. 398), the testator, after making several bequests, gave the income of the remainder of his estate to his wife during her life; the will then proceeding as follows: "And after the decease of my said wife I give, devise, and bequeath all my estate, real, personal, and mixed, to my children who may then be living, in equal shares; and in case either of them shall have died, leaving legal heirs, then such heirs shall be entitled to the share which their deceased father or mother would have been entitled to if living; to hold them and their respective heirs and assigns forever." The court held that the interest of the children of the testator during the life of the wife was merely contingent. Judge Allen, in giving the opinion of the court, said: "The devise is clearly limited to the children who may be living at the decease of the testator's wife, and until that event happens it cannot be ascertained who will take. This case, in all essential particulars, is like the one under consideration.

I think the interest the grandchildren have in the principal estate of the testator is merely contingent; and, if so, then it is clear that the disposition the testator attempted to make of it is void by the statute against perpetuities. This the majority of the court concede, and the question is too clear for discussion.

In this opinion Loomis, J., concurred.

RUSSELL vs. MINTON.

[42 New Jersey Equity, 123.]

PROVISION IN LIEU OF DOWER.—LIMITATION.

A testamentary gift by a husband to his wife was accompanied by a provision that it should be in lieu of her dower and of any other right to which by law she might be entitled in his estate, real or personal: *Held*, that the gift was

intended to be in satisfaction of such rights only, in or to the testator's property, as the law gives her as his widow; and consequently that it will not prevent recovery upon a mortgage (given by him to her before marriage) held by her upon his property.

BILL to foreclose. On final hearing upon bill and answer. Submitted upon briefs of counsel.

Babbitt & Lawrence, for complainant.

H. C. Pitney, Jr., for defendant.

THE CHANCELLOR. The bill is filed to foreclose a mortgage upon land in Morris county, given by James E. Van Wagner and Frederick J. Van Wagner to Sarah W. Russell, in November, 1879, to secure the payment of their bond to her, of the same date, for \$3,000 and interest. In December, 1880, Frederick J. Van Wagner conveyed his half of the property to James E. Van Wagner. After the giving of the mortgage the mortgagee married James E. Van Wagner. He died in June, 1884. By his will he made certain provisions for the benefit of his wife and Horace Van Wagner and Harriet Van Wagner. In addition to such provision for his wife, he made the following :

"I do further give and bequeath unto my said wife, Sarah W. Van Wagner, during the term of her natural life, all the interest, rents, issues and profits arising from the balance of my estate, first, however, charging them with the payment of taxes, assessments, insurance premiums, expenditures for repairs, and all other legal charges, and with all expenditures made with a prudent regard for the welfare and best interests of my estate."

He then adds :

"The foregoing provisions for my wife are in lieu of her dower in my real estate or of any other right which by law she may be entitled to in my estate, real or personal."

By the will the testator appointed his wife and Guy Minton executors thereof and trustees thereunder. Both proved the will. On November 11th, 1885, Mrs. Van Wagner as-

signed the mortgage to the complainant. The defendant, Minton, alleges in his answer that the assignment was without consideration, and that Mrs. Van Wagner accepted the benefit of the before-mentioned testamentary provisions; that, in view of the latter fact, the mortgage should be held to have been satisfied. The cause is submitted upon bill and answer and briefs of counsel. The whole of the will is not before me, but it appears by a statement in the brief of complainant's counsel that the testator made provision or gave direction in it for the payment of his debts. It does not appear what the provision was which the testator made in the will for his wife in addition to that which is above quoted. Minton's counsel insists that the declaration of the testator that the above-quoted provision made for his wife was intended to be in lieu of her dower in his real estate or (and) of any other right which by law she might be entitled to in his estate, real or personal, is equivalent to a declaration that those provisions were made in satisfaction of all claims which she had against him, and the arguments in the briefs of counsel are directed to this point.

It is a rule in equity that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it will be presumed, in the absence of any information of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt; but the court will lay hold of any circumstance, although slight and minute, whereupon to ground an exception to the rule. (2 Wms. Exrs. 1297; *Van Riper v. Van Riper*, 1 Gr. Ch. 1; *Rogers v. Hand*, 12 Stew. Eq. 270.) Where the will directs that the testator's debts and legacies be paid, the rule does not apply. (2 Redf. Wills, 519.) Nor is it applicable where the debt and legacy are of different natures, either with reference to the subject-matter, or extent of interest, as where the legacy to the creditor is of interest or income for life. (*Alley v. Alley*, 2 Ves. Sr. 37; *Forsight v. Grant*, 1 Ves. 298.) In the latter case a wife was entitled, under a bond given by her husband upon the marriage, to a sum payable three months after his death for her, for life, and then for the children; and

if there should be no children, then the money was to go to her absolutely. By his will her husband gave all his property, real and personal, which he then had, or of which he might die possessed, upon trust, to pay her the rents and interest for life, and then the whole was to go to the children; and he added an express revocation of all former settlements and wills made by him. There was no issue. It was held that the widow was entitled both to the debt upon the bond and the provision under the will. In the case in hand the testator provides that the gift to his wife of interest, &c., shall be in lieu of her dower in his real estate, and of any other right to which by law she may be entitled in his estate, real or personal. This language does not embrace debts due from him to her, but only such rights in or to his property as the law gives to her as his widow. It is urged that the testator must have intended to include all rights founded in law. But in *Forsight v. Grant*, where the testator, by the will, not only gave all his real and personal estate which he had at the time of making the will, or of which he might die possessed, but revoked all former settlements and wills made by him, and he had made no settlements, except by the bond, it was held to be clear that the bond debt was not satisfied by the testamentary provision.

The complainant is entitled to a decree of foreclosure and sale of the mortgaged premises.

The following note is reprinted from the New Jersey Equity Reports, Vol. 42, by the permission of JOHN H. STEWART, Esq., the reporter:

Accepting a devise of lands, or other provision in lieu of dower, does not deprive the widow of her interest in lands of which her husband died intestate. *Van Arsdale v. Van Arsdale*, 2 Dutch. 404; *Carder v. County*, 16 Ohio St. 858; *Seabrook v. Seabrook*, 10 Rich. Eq. 495. See *Jones v. Lloyd*, 38 Ohio St. 572; *Spangler v. Dukes*, 39 Ohio St. 642; *Vaughan v. Vaughan*, 30 Ala. 329; *Hardy v. Scales*, 34 Wis. 452; *Davidson v. Boomer*, 18 Grant Ch. 475; *Havens v. Havens*, 1 Sandf. Ch. 324.

Nor in lands acquired after the making of the will. *Stark v. Hunton*, Sax. 216; *Hall v. Hall*, 2 McCord Ch. 269; *Philadelphia v. Davis*, 1

Whart. 490; *Cunningham v. Shannon*, 4 Rich. Eq. 135. See *Raines v. Corbin*, 24 Ga. 185; *McElfresh v. Schley*, 2 Gill, 182; *Durham v. Simmons*, 23 Md. 233; *Sutton v. Askew*, 65 N. C. 172.

Nor in lands aliened during coverture without the widow having joined in the conveyance. *Corriell v. Ham*, 2 Iowa, 552; *Westbrook v. Vanderburgh*, 36 Mich. 80; *Lewis v. Smith*, 9 N. Y. 502; *Borland v. Nichols*, 12 Pa. St. 88; *Braxton v. Freeman*, 6 Rich. 35; *Higginbotham v. Cornwell*, 8 Gratt. 83 (approved in *Nelson v. Kownslar*, 79 Va. 477); *Rank v. Hanna*, 6 Ind. 20; *Shuman v. Shuman*, 9 W. Va. 50. But see *Haynie v. Dickens*, 68 Ill. 267; *Allen v. Pray*, 12 Me. 138; *Steele v. Fisher*, 1 Edw. Ch. 485; *Moore v. Steidel*, 1 Disney, 281; *Kendall v. Kendall*, 42 Iowa, 464 (by statute); *Hornsey v. Casey*, 21 Mo. 545; *Potter v. Potter*, 1 R. I. 43; *Fitzhugh v. Foote*, 3 Call, 13; *Gray v. McCune*, 23 Pa. St. 447; *May v. Fletcher*, 40 Ind. 575 (by statute); *Bates v. McDowell*, 58 Miss. 815 (by statute).

Nor in his undisposed-of personal estate. *Colleton v. Garth*, 6 Sim. 19; *Pickering v. Stamford*, 3 Ves. 492; *Lett v. Randall*, 3 Sm. & G. 88; *Oldham v. Carleton*, 2 Cox Ch. 399; *Jennings v. Smith*, 29 Ill. 116; *Findley v. Findley*, 11 Gratt. 434; *Collins v. Carman*, 5 Md. 528; *Kempton's Case*, 23 Pick. 163; *Sullings v. Richmond*, 5 Allen, 187; *Johnson v. Goss*, 132 Mass. 274; *Dildine v. Dildine*, 5 Stew. Eq. 78; *Leinaweaver v. Stoeve*, 1 Watts & Sarg. 160; *Reed's Estate*, 82 Pa. St. 428; *Demoss v. Demoss*, 7 Coldw. 256; *Barber v. Hite*, 39 Ohio St. 185; *Bane v. Wick*, 14 Ohio St. 505; *Carmen's Estate*, 11 W. N. C. (Pa.) 95. See *Waddle v. Terry*, 4 Coldw. 51; *Skellinger v. Skellinger*, 5 Stew. Eq. 659; *Gotzian's Estate*, 34 Minn. 159; *Dupree v. Cary*, 6 Leigh, 36.

Nor in lapsed or void legacies or devises. *Simpson v. Hornsby*, 3 Ves. 335; *Pickering v. Stamford*, 3 Ves. 332, 492 [see *Byrne v. Frere*, 2 Moll. 177]; *Farthshore v. Chalie*, 10 Ves. 17; *Hand v. Marcy*, 1 Stew. Eq. 59; *Jones v. Jones*, 8 Gill, 197; *Johnson v. Johnson*, 32 Minn. 513; *Melchor v. Burger*, 1 Dev. & Bat. Eq. 634; *Power v. Cassidy*, 79 N. Y. 603; *Vernon v. Vernon*, 53 N. Y. 351. But see *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Bullard v. Benson*, 31 Hun, 104; 96 N. Y. 499; s. c., 1 Dem. 486; *Gibbon v. Gibbon*, 40 Ga. 562.

Nor in stocks, &c., standing in the joint names of herself and testator. *Dummer v. Pitcher*, 5 Sim. 35; 2 Myl. & K. 262; *Sanford v. Sanford*, 45 N. Y. 723; 2 T. & C. 641; 58 N. Y. 69; *O'Driscoll v. Koger*, 2 Dessaus. 295. See *Coates v. Stevens*, 1 Y. & C. Exch. 66. As to lands standing in their joint names, see *Exchange Bank v. Stone*, 80 Ky. 109; *Crenshaw v. Creek*, 52 Mo. 98; *Ketchum v. Walsworth*, 5 Wis. 95.

Nor in her own separate property. *Croswaigh v. Hutchinson*, 2 Bibb. 407 [see *Tomlin v. Jayne*, 14 B. Mon. 160]; *Mumford's Estate*, *Myrick* (Cal.), 138; *Wood v. Wood*, 1 Metc. (Ky.) 512; *Liles v. Fleming*, 1 Dev. Eq. 184; *Gordon v. Stevens*, 2 Hill Ch. 46; *Hall v. Hall*, 8

Rich. 407; McCormick v. McNeel, 58 Tex. 15; Hassenritter v. Hassenritter, 77 Mo. 162; Watterson's Appeal, 95 Pa. St. 812. See Weeks v. Patten, 18 Me. 42; Kinnaird v. Williams, 8 Leigh, 400; Gore v. Stevens, 1 Dana, 201; Clay v. Hart, 7 Dana, 1; Van Dyke's Appeal, 60 Pa. St. 481; Reeves v. Garnett, 84 Ala. 558; Pemberton v. Pemberton, 29 Mo. 408; Field v. Eaton, 1 Dev. Eq. 283; Hibbs v. Insurance Co. 40 Ohio St. 548; Cox v. Rogers, 77 Pa. St. 160; Upshaw v. Upshaw, 2 Hen. & M. 361; Ditch v. Sennott, 117 Ill.; Gaines v. Briggs, 9 Ark. 46; Sigmon v. Hawn, 87 N. C. 450.

Nor in the statutory provisions for widows' temporary support. Wilber's Case, 52 Wis. 295; McManus's Estate, 14 Phila. 660; Miller v. Stepper, 32 Mich. 194; Stinewan's Appeal, 84 Pa. St. 394. See Griffith v. Canning, 54 Mo. 282; Speidel's Appeal, 107 Pa. St. 18; Farnsworth v. Cole, 42 Wis. 403.

BARTLETT vs. SLATER.

[53 Connecticut, 102.]

GIFT OF INCOME.—INTEREST.—ANNUITY.

Where a testator leaves money in trust, the income from which is to be paid to a specified beneficiary, the bequest being made payable to the trustee within one year from the testator's death, at the convenience of the executors, it will not carry interest until the end of a year from the testator's death.

A gift of income from a fixed time is not the gift of an annuity.

AMICABLE submission upon an agreed statement of facts, which sufficiently appear in the opinion.

Francis Bartlett, pro se.

J. Halsey and W. A. Briscoe, for defendants.

PARK, C. J. The will of John F. Slater bequeathed the sum of one million dollars to his son-in-law, Francis Bartlett, the plaintiff in this suit, in trust to pay the income arising therefrom, or such portion thereof as he, the trustee might

consider best, to the testator's granddaughter, the daughter of Mr. Bartlett, during her natural life.

In another clause of the will this bequest is made payable to the trustee, by the executors of the will, within one year after the death of the testator, at the convenience of the executors, and they are authorized to pay it in stocks or bonds belonging to the estate at their cash value, or in cash, as might be preferred.

The sole question in the case is, whether the trustee is entitled to interest on this bequest from the death of the testator, or from the end of one year thereafter.

The general rule on the subject is thus stated in Williams on Executors: "When no time of payment of the legacy is fixed by the will, the executor is allowed one year from the death of the testator to ascertain and settle his affairs; at the end of which time the court, for the sake of general convenience, presume the personal estate to have been reduced to possession. Upon that ground interest is payable from that time, unless some other period is fixed by the will. Nor will interest be payable from an earlier date though there is a direction in the will to pay the legacy as soon as possible." (2 Williams on Exrs. 1424. See also 2 Redfield on Wills, 465, 471; 1 Swift's Digest, 455.)

There are some exceptions to this general rule. One is, where a legacy is given in satisfaction of a debt. Another is, where a legacy is given to the testator's minor child, or to one to whom the testator is *in loco parentis*, and there is no other provision for the maintenance of the legatee. Another is, where the legacy is an annuity; and still another, where the bequest is of the residue of the testator's estate, or of some aliquot part thereof, in trust to pay the interest or income to the legatee for life with remainder over at his death.

In all these cases the rule is to allow interest from the death of the testator. But no one of these exceptions to the general rule applies to the case under consideration. It is claimed, however, that the legacy, being given to a third person to pay the income to the beneficiary during her natural

life, is in the nature of an annuity, and that so the rule in relation to annuities should apply.

The language of the bequest is as follows: "To pay the income arising therefrom, or such parts thereof as he [the trustee] may consider best, and at such times as he sees fit, to my granddaughter during her natural life." This bequest grants discretionary power to the trustee to pay to the beneficiary such portion of the income as he may consider best. He may pay over the whole or any portion thereof, or none at all, according to his discretion. The time of payment, too, is left wholly to the discretion of the trustee. The bequest has but few of the elements of an annuity, which is "a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, charging the person of the grantor only." (2 Williams on Exrs. 809.)

In the case of *Booth v. Ammerman* (4 Bradford, 129) the court says: "The income or interest of a certain fund is not an annuity, but simply profits to be earned, and, although directed to be paid annually, that relates only to the mode of payment, and does not change the character of the bequest. In such a case it does not become the duty of the executor to invest the principal fund until the end of a year, and the interest does not become payable until the end of the second year." Redfield (on Wills, vol. 3, 186) says: "In the case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but when the interest or net income of a certain sum is given, it will not begin to run till the end of the first year from the death of the testator, and the first payment consequently becomes due in two years from that date."

Lord Eldon, in *Gibson v. Batt* (7 Ves. 96), drew the distinction between an annuity and a legacy for life, which has been cited in every thoroughly considered case since. He says: "If an annuity is given, the first payment is payable at the end of the year from the death; but if a legacy is given for life, with the remainder over, no interest is due till the end of two years. It is only the interest of the legacy;

and till the legacy is payable there is no fund to produce interest."

We think it is clear that the legacy in question cannot be regarded as an annuity.

The trustee further claims that the clause in the will which declares that "the legacies as aforesaid are to be paid within one year from my decease, at the convenience of my executors, and said executors are authorized to pay the same in stocks and bonds belonging to my estate at their cash value or in cash as may be preferred," shows that the testator intended that the legacy in question should be paid at some period or periods during the year, and not after the expiration of the year. He thus presents the point in his brief: "The period of payment within the year was to be governed by the convenience of the executors, and, as bearing upon that convenience, payment in the bonds and stocks of the testator was distinctly authorized. The case, as submitted, shows that, after payment of all debts and other legacies, there existed in the hands of the executors interest-bearing and dividend-paying bonds and stocks largely in excess of the sums necessary to create the trust fund. Can it be said that the testator intended that the interest and income of these stocks and bonds should be retained by the executors and added to the *corpus* of the estate until the last day within the year after his death, and then that the fund should be paid to the trustees in those stocks and bonds or in cash? We submit that, fairly construed, it indicates an intent that the *cestui que trust* should enjoy the interest and income of the trust fund before the expiration of the year."

Still the will expressly gave the executors one year after the death of the testator in which to pay the legacy to the trustee. Payment on the last day or last hour of the year would be within the will. That payment may be made at the convenience of the executors can make no difference. They were to be the judges of their convenience. Whenever they should make payment within the year, it would be presumed that then was the convenient time for payment. They were only restricted to the year. But the will declares that

payment may be made in bonds and stocks at their cash value at the time payment shall be made within the year. The bonds were interest-paying bonds, and the stocks were dividend-paying stock. The cash value of such bonds and stocks, at any particular time, is made up of their value as representing principal or capital and the accruing interest or dividend. The value thus varies with the nearness or remoteness of the time when the next dividend will be declared or the next interest become payable. But the will takes no notice of this enhancement of value. The payment of one million dollars may be made in their cash value at the time of such payment; no more and no less. And if payment shall be made in cash on the last day of the year after the death of the testator, the payment shall be of the sum of one million dollars, no more and no less. The will declares that such payment in either mode shall be full payment of the bequest. How then can interest be claimed by the terms of the will?

This would seem to be a full and complete answer to the further claim of the trustee, that a proper construction of the bequest in question shows it to be a bequest for the maintenance of the granddaughter of the testator, and that so the bequest carries interest from the death of the testator, not by presumption of law, but by the will itself.

The answer is, that if the trustee is right in his claim, that the will itself shows the bequest to be given for the maintenance of the granddaughter, still the will itself declares that the payment of one million dollars in cash, or in stocks and bonds at their cash value, at any time within the year from the death of the testator, shall be full payment of the bequest; not full payment of the principal sum, leaving the interest unpaid, but full payment, principal and interest, if there could be any interest. Surely the testator had the right to say how large the bequest should be which he left for the maintenance of his granddaughter, if the trustee is correct in his construction of the will.

But is he correct in that construction? He bases his claim upon the word "best" in the bequest. He presents the point thus: "The will provides, whether the ability of the father to

furnish maintenance for his daughter should exist or not, that some part of the income shall, during the infancy of the daughter, as well as afterwards, be paid to that daughter. It is to be such portion as that father shall consider best. Best for whom? Not best for the trustee, to diminish his own natural liability, but best for the infant. What else could be best for such infant but education and maintenance?" But many other things might be best. It might be best to withhold rather than to pay. Manifestly, the great concern of the testator, in bequeathing this very large sum of money, the interest of which would be sixty thousand dollars per year, was the welfare of his young granddaughter, who was just entering into womanhood. There was greatly more danger that her father, the trustee, would pay her too much of this vast income during her minority than that he would pay her too little; and during such time it seems to be clear that the word "best," as used by the testator, had more reference to withholding the income than to paying it. The plain meaning is—pay her only what you think best. We think the trustee's construction of the bequest is not correct.

We therefore advise the Superior Court that the plaintiff is not entitled to interest till the end of one year from the death of the testator.

In this opinion the other judges concurred.

MORFORD vs. DIEFFENBACKER.

[54 Michigan, 593.]

CONDITIONAL DEVISE FOR SUPPORT.

The probate courts of Michigan have, in probate matters, a general, and, for the most part, exclusive jurisdiction; and their orders cannot be attacked collaterally upon any assumption that evidence was wanting to support jurisdic-

tional allegations; their action, when properly invoked, is presumed to be rightful.

A devise of property for the devisee's natural life, with authority to dispose of enough for his support, if the use of it should be insufficient, gives only a life estate with conditional power of disposal. And so long as any money bequeathed by the will is available for the devisee's support, the real property cannot be sold for that purpose.

A fund provided for the "support" of a person cannot be appropriated to the building or completion of a dwelling-place.

WRIT of error. Action in ejectment.

Westerman & Westerman and Millard, Weaver & Weaver,
for appellant.

Bean & Underwood, for appellee.

COOLEY, C. J. Ejectment. The suit was begun by the filing of a declaration in the name of John Armstrong as guardian of Mariam R. Morford, an infant, as plaintiff, and counting on the seizin of said plaintiff "as such guardian and in the right of said Mariam Morford," in the west half of the southwest quarter of the southwest quarter of section five, and the west twenty-five acres of the west half of the northwest quarter of section eight in township six south of range three east. There was also a count in which an undivided half of the west fifty acres of the west half of the northwest quarter of section eight was claimed.

After the defendant had appeared and filed a plea to the merits, the infant, by her guardian, presented a petition in which it was stated that she was nine years of age; that she was entitled to recover certain real estate described in the declaration; and she prayed that Armstrong, her guardian might be appointed her next friend to appear for her in said suit, and that the declaration in the cause might be amended by striking out whenever occurs the name of the plaintiff John Armstrong as guardian of Mariam R. Morford, and substituting in place thereof Mariam R. Morford, an infant under the age of twenty-one years, by John Armstrong, her next friend. This motion was opposed by defendant, but was granted, and

it was ordered that the cause proceed the same as though it had been commenced in the name of Mariam R. Morford, by John Armstrong, her next friend.

When the cause came on for trial the defendant objected to the trial on the grounds :

1. That there was no issue formed between the parties therein.

2. That the court had no jurisdiction to try the same, there being no proceedings by which the defendant had been legally summoned or brought into court to answer this plaintiff.

3. That no plea had been filed by the defendant to the declaration of this plaintiff.

This objection merely raised the question of the power of the court to allow the amendment which had been ordered. The court overruled it, and directed the trial to proceed.

In tracing title in the plaintiff it became necessary to show the probate in Michigan of the will of William Dieffenbacher, formerly of the county of Livingston, in the State of New York, which bore date March 12, 1868, and was probated in the Surrogate's Court of that county in the following May. For this purpose the records of the Probate Court of Lenawee county were put in evidence, from which it appeared that on January 16, 1882, John Armstrong presented to that court a petition reciting the death of said William Dieffenbacher and the probate of his will in the State of New York; that at the time of his death he was seized of real estate situate in said county of Lenawee, which by the will was devised to Henry Dieffenbacher and Elizabeth Dieffenbacher for the term of their natural lives, and at their deaths to the children of said Henry in fee; that said Henry had died leaving two children, Elva and Charles; that said Elva had since deceased, leaving a last will, by which an interest in said real estate was devised to Mariam R. Morford, an infant, of whom petitioner was guardian. And the petition prayed that said will of William Dieffenbacher be admitted to probate in Lenawee county, and letters for the execution of the same granted.

The petition was not verified by oath, and the record shows

no proof made of Armstrong's guardianship, but an order was made for hearing upon it, and notice of hearing was duly published. On the day appointed for hearing, the will with the New York probate was presented, and no objection being made, an order admitting it to probate in Lenawee county was duly entered.

When these proceedings were offered in evidence on this trial, the defendant objected that they were invalid because it did not appear that John Armstrong was in any manner interested in the estate of William Dieffenbacker, or had any right to move in the probate of the will. He stated in his petition that he was guardian to Mariam R. Morford, but it was claimed he made no proof of the fact either at the time of presenting the petition or on the day of hearing. He did not even state where he was appointed such guardian. The court overruled this objection, and the defendant excepted.

The will of Elva Dieffenbacker bears date February 21, 1880, and its bequests are in the following words:

First. I desire that all my just debts and funeral expenses be paid by my executor out of my estate.

Second. I hereby give and devise unto my cousin, Mariam R. Morford, my organ now in my possession, the same being the only organ now in my possession.

Third. I hereby give and devise to my mother, Elizabeth Dieffenbacker, all the rest, residue and remainder of my property, of whatever nature, which I shall die seized of, for and during her natural life; and in case the use of said property shall be insufficient for her support, then and in such case I hereby authorize her to dispose of such of said property, and such amounts thereof as shall be sufficient for her support; and whatever shall remain at her death I hereby give, devise, bequeath unto my said cousin, Mariam R. Morford, and to her and her heirs forever.

The facts in the case, and the conclusions of law thereon, are found by the circuit judge as follows:

FINDINGS OF FACTS.

First. William Dieffenbacker, the grandfather of the above-named defendant, died at Geneseo, Livingston county, State of New York, on the 11th day of May, A. D. 1868, seized in fee-simple of the west half of the southwest quarter of section 5, and the west 50 acres of the west half of northwest quarter of section 8, all in town 6 south, of range 3 east, in the township of Adrian, county of Lenawee, and State of Michigan, which above-described property is the subject-matter of this suit.

Second. That said William Dieffenbacker died testate, and his last will and testament, after being first proved and allowed by the Surrogate Court of the said county of Livingston, N. Y., was proved as a foreign will and admitted to probate by the Probate Court of Lenawee county, State of Michigan, upon the petition of John Armstrong, mentioned as the next friend of the plaintiff in the above-entitled cause, as more fully and at large appears by the files and records of said Probate Court in the matter of the estate of said William Dieffenbacker, which said files and records are in evidence in this cause, and are hereby made a part of these findings. By the terms of which last will and testament the said William Dieffenbacker gave and bequeathed to his son, Henry Dieffenbacker, and wife Elizabeth, the use, control and interest of the land above described, during their lifetime, or the lifetime of either of them; and at their death, or the death of both said Henry and Elizabeth, said land was to go to the children of said Henry Dieffenbacker, or their heirs, forever.

Third. That the children of said Henry and Elizabeth Dieffenbacker were Elva E. Dieffenbacker and Charles Dieffenbacker, the defendant in the above-entitled cause.

Fourth. That the said Henry and Elizabeth Dieffenbacker held the possession of said lands and premises under and by virtue of said will, and occupied the same during their respective lives, residing in what was designated as the old house, on the east half of the 50 acres before described; and, after the death of said Henry, the said Elva and her mother Elizabeth

continued to live in and occupy said old house, in which house the said Elva died.

Fifth. That the said Henry died about the year A. D. 1870. The said Elva E. died May 4th, 1880, and the said Elizabeth died August 20th, 1881, or about fifteen months after the death of said Elva.

Sixth. That subsequent to the death of said Henry, and on July 22d, 1879, the said defendant Charles Dieffenbacker and his wife conveyed, by quitclaim deed, to the said Elva Dieffenbacker, all their interest in the 20 acres of said property lying north of the highway, described as west half of southwest quarter of southwest quarter section 5, town 6 south of range 3 east, and on the same day the said Elizabeth Dieffenbacker also conveyed to said Elva, by her quitclaim deed, all her life-interest in said 20 acres.

Seventh. That the said Elva died seized, in fee-simple absolute, of the above-described 20 acres, and of an undivided one-half ($\frac{1}{2}$) interest in the 50 acres before described, her brother Charles, the above-named defendant, being seized of the other undivided one-half of said 50 acres, the whole being subject to the life-interest of the said Elizabeth Dieffenbacker, their mother.

Eighth. That the said Elva E. Dieffenbacker died on May 4th, 1880, as aforesaid, testate, leaving a last will and testament, in which she appointed Linus Van Deusen her executor, he accepting and entering upon that trust; which said last will was admitted to probate in the Probate Court of Lenawee county, Michigan, on the 21st day of June, A. D. 1880, as more fully appears by the files and records of said Probate Court in the matter of the estate of Elva Dieffenbacker, deceased (which said files and records are in evidence in this cause and are hereby made a part of these findings); by the terms of which said will, after providing for the payment of all her just debts and funeral expenses by her executor, and after giving her organ to her cousin, Mariam R. Morford, the plaintiff herein, she gave her mother a life estate in her property, with a contingent power of sale, as follows: "I give and devise to my mother, Elizabeth Dieffenbacker, all the rest, resi-

due and remainder of my property of which I shall die seized, for and during her natural life. And in case the use of said property shall be insufficient for her support, then and in such case I hereby authorize her to dispose of such of said property, and such amounts thereof, as shall be sufficient for her support, and what shall remain at her death I hereby give, devise and bequeath to my said cousin, Mariam R. Morford, and to her heirs forever."

Ninth. That about two years before her death, the said Elva received from an eastern relative a legacy amounting to over \$3,000, and from that time to her death supported her mother, Elizabeth, for the most part, providing her with an abundance of clothing and other comforts, and had contracted in writing for the construction of a new house on the 20 acres aforesaid, which she owned in fee-simple, at an expense of \$1,100, upon which she had paid \$850; which said house was completed under said contract after her death, and into which said Elizabeth Dieffenbacher moved in July, 1880, with Mariam R. Morford, the plaintiff herein, and in which the said Elizabeth continued to reside until her death on August 2d, 1881.

Tenth. That on December 21st, 1880, and about seven and a half months after the death of the said Elva, the said Elizabeth Dieffenbacher gave to her son, Charles Dieffenbacher, the defendant herein, a quitclaim deed of the west twenty-five acres of the fifty acres before described, the actual consideration therefor being \$250, which deed is in evidence in this case, is marked Defendant's Exhibit A, and is hereby made a part of these findings.

Eleventh. That at the time of the giving of said deed there was on hand of the personal property of the estate of said Elva a horse and buggy, two cows, two steers, wheat, hay, corn, potatoes and other chattels of several hundred dollars value. That said Elizabeth had also received from the estate of said Elva the sum of \$385 in cash, by virtue of a certificate of deposit of money in bank payable to said Elva, upon which certificate the said Elizabeth had indorsed the said Elva's name, appropriating the same, and making no account there-

of to the estate of said Elva, paying, however, several debts of the said Elva's and of her own, including the \$250 balance upon the contract for the new house, none of which debts were proved or allowed by the Probate Court as debts or claims in the matter of the estate of said Elva.

Twelfth. That at the time of giving the said deed of the west twenty-five acres aforesaid there was in fact no necessity of the sale of any portion of the estate of said Elva for the support of said Elizabeth, but that the money she had received and use of the said property was amply sufficient therefor.

Thirteenth. That on June 4th, 1881, thirteen months after the death of the said Elva, and about one and a half months before her own death, the said Elizabeth conveyed by a warranty deed, for the expressed consideration of \$1,500, to the said Charles, her son, defendant herein, the twenty acres north of the highway, as heretofore described, and upon which she then lived, it being stated in the deed aforesaid that the sale was necessary for her support; the said Charles paying her upon the same the sum of \$700, that being the amount [for which he was able to mortgage said property, he verbally agreeing, as part of the consideration, to support her for the balance of her life; and after mortgaging said property giving her a life-lease of the same, which said deed is in evidence in this cause, is marked Defendant's Exhibit B, and is hereby made a part of these findings.

Fourteenth. That the said Elizabeth, at the time of the death of said Elva, was supplied with an abundance of clothing and bought but little thereafter. That she had lived for many years on a farm, was a woman of frugal habits and accustomed to a simple mode of life, in keeping with her surroundings. That she had for several years been affected with pulmonary consumption, and died of that disease; that she was, till within seven or eight weeks of her death, up and around, capable of going out to visit and on business, and of looking after and doing a portion of her own work, though in delicate health, under the care of a physician, and needing help most of the time, though having help less than one-half of the time.

Fifteenth. That the proceeds of the farm, exclusive of the house and orchard, were sufficient to supply the said Elizabeth with staple provisions and common groceries, and that the same would have rented for at least \$150 per year; that the said Elizabeth received from the estate of said Elva, during the time she survived her, cash as follows:

From certificate of deposit.....	\$385 00
From executor of estate.....	58 00
Charles, use of 12 acres.....	36 00
	<hr/>
	\$479 00

That there were in the hands of the executor, at the time of her death, belonging to Elva's estate, \$165.

Sixteenth. That the legitimate cash expenditure during the time the said Elizabeth survived the said Elva, for her comfortable support, would not and did not exceed the sum of five hundred dollars (\$500), including hired help and physician fees, the use and production of the farm being considered.

Seventeenth. That there was a sufficient for the comfortable support and maintenance of the said Elizabeth out of the money, personal property and rents and profits of the realty, without conveying said real estate away; and that as a matter of fact the contingency which would have made the power of defendant in the will of said Elva operative, did not arise.

Eighteenth. That the said Charles Dieffenbacker was at the time of the conveying said property to him insolvent and without means to purchase, and the only consideration in money paid by him for the same was the amount he was able to mortgage said property for.

Nineteenth. That the said Charles now claims title to and holds possession of said real estate, to wit, the twenty acre piece lying north of the road, and heretofore more particularly described, and the twenty-five acres of the fifty-eight acres heretofore described, and was at the time of the commencement of this suit withholding the possession of said premises under and by virtue of said deeds, marked Defendant's Exhibits A and B. That the said Charles lived with his mother at the time the second deed (Exhibit B) was made, and con-

tinued so to live until the time of her death; that prior to that time he lived near her, and was well acquainted with her circumstances, and all the various facts set forth in these proceedings.

Twentieth. That it does not satisfactorily appear that the said defendant, before the commencement of this suit, ousted the plaintiff from the use and enjoyment of the east twenty-five acres of the west fifty acres of the west half of the north-west quarter of section eight, township and range aforesaid; that a fair market valuation of the twenty acres north of the road would be \$16, and of the fifty acres \$45 per acre.

Twenty-first. The files, records and all exhibits offered in evidence in this case, and allowed, are hereby especially referred to and made a part of these findings.

CONCLUSIONS OF LAW.

By the terms of the will of Elva Dieffenbacker, her mother Elizabeth had a life interest in her estate, coupled with a power to sell upon the happening of a contingency. This is not a case of power to sell at discretion, which would create a fee; but the power depending upon a contingency, it is incumbent upon those claiming title by the exercise of the power to show that the power was well executed, and that the contingency actually, as a matter of fact, had arisen at the time the power was exercised. Upon them, the defendants, is the burden of proof to show that fact.

It cannot be presumed from the terms of the will that any such contingency could arise, empowering sale of realty, while there were money, goods or chattels of said estate on hand; and an insufficiency of money, goods and chattels to comfortably support said Elizabeth was a condition precedent to sale of real estate.

It is argued with much force and insisted by counsel that credit should be given for the money expended by said Elizabeth for the completion of the house, for the funeral expenses of Elva, for a monument, and for other apparently legitimate debts and charges against the estate of said Elva, and that, should credit be so given, it would appear from the evidence

that the contingency creating power to dispose had arisen ; but these, if legitimate, should have been proved and allowed in the Probate Court. By the express terms of the will the power and authority to pay these debts, if just, was conferred upon the executor, as such. It was the expressed will of the testator that this power should only be exercised by that officer *as such*. If Elizabeth Dieffenbacker took it upon herself, in the face of that provision in the will, to administer the estate of her daughter, she certainly did it at her peril and the peril of those claiming under her, and the court is not warranted in sustaining the action, and allowing accounts which have never been presented to the proper tribunal for adjudication.

It is claimed that as money left in bank by Elva belonged to her estate, and was drawn without authority of her representative by an unauthorized endorsement, there was no valid payment of the same ; that the representative of Elva could still demand and recover the same, and the said Elizabeth would not be obligated to use such money for her support before she would be authorized to sell ; but surely, if the said Elizabeth, by requesting and appropriating said certificate of deposit, kept the same from the knowledge of the executor, and deprived the estate thereof, at this time, she and those claiming under her, would be estopped from claiming advantage by her wrong.

In the event of the happening of the contingency creating the power to sell real estate, the authority would only arise to use so much as was reasonably necessary for her comfortable support, and the sale must be made for that purpose, and with that view only. Even though the contingency might have existed, if the sale was made for other purposes, it would be *ultra vires* and void. Unfortunately, the circumstances surrounding this case lead to the impression that a purpose to subvert the provisions of the will governed the conduct of the parties to the conveyance in question, rather than an honest purpose to properly and judiciously execute the power.

The sales, made as they were by Elizabeth Dieffenbacker

to her son Charles, a person without means and involved, who never paid anything upon the same except what he could raise by mortgage on the property bought; the small consideration; the sale of the twenty acres with the house where she lived while a smaller and much less valuable and useful tract remained—taint the transaction with a lack of honest motive not tending to substantiate the claim that her necessities created the contingency authorizing the conveyance.

No ouster is considered to have been shown as to the east twenty-five acres of the fifty acres in question, and as to that the plaintiff cannot recover the same in this action. It is, therefore, considered, upon the facts proved and the law found by the court, that the said plaintiff is entitled to the premises described in the third count of her declaration, viz., the west half of southwest quarter of southwest quarter of section 5, town and range aforesaid, consisting of 20 acres; and under the fourth (4) count in said declaration, to an undivided one-half interest in the property described therein, to wit, an undivided one-half interest in the west twenty-five acres of the west half of northwest quarter section eight (8), town and range aforesaid.

Let a judgment be rendered accordingly.

This statement of the case will be sufficient for the purposes of an examination of the legal questions.

I. Defendant contends that the court had no power to permit an amendment of the declaration which substituted one party plaintiff for another. This it is said made a new suit of it; the defendant has never pleaded in that suit, but he was compelled, notwithstanding his objection, to proceed to the trial of a case in which, if there was any issue, it was one made by the court itself, without his consent and against his remonstrance. The statute of amendments is not broad enough to authorize a change of parties and the substitution of a new action by another plaintiff.

This contention is plausible, but we think not sound. In *Kimball, &c., Co. v. Vroman* (35 Mich. 310), a declaration against "William A. Tomlinson, as president for the time be-

ing, of the Kimball & Austin Manufacturing Company, a company organized and existing under and by virtue of the laws of said State, and doing business at Kalamazoo, in the county aforesaid," was allowed to be amended on the trial by striking out the name of Tomlinson and the designation of his official character, leaving the declaration to stand as one against the company, as defendant. This may be said to have been a change of the party defendant; but the purpose had been to charge the company; the declaration counted on an obligation of the company, and the amendment did not change the issue which the parties had expected to try. In *Kinney v. Harrett* (46 Mich. 87), an error had been committed in planting the suit of precisely the same character with that committed in this case; but it was said that as the title claimed by the wards was set out in the declaration, and the guardian was only a nominal party, the court in its discretion might have permitted an amendment. We think so still.

The defendant complains that he had no opportunity to plead to the amended declaration. But the Circuit Court was not informed that he desired any such opportunity, nor is there any reason to suppose he did. There is no pretense or suggestion now that any different issue was desired than the one made by the plea before filed, and on which trial was had, and no ground for any supposition that the defendant was deprived of any substantial right by either the amendment or the order to proceed to trial.

II. The objection to the probate of the will of William Dieffenbacker in the county of Lenawee is also, we think, without merit. The objection assails the probate collaterally on the ground of the want of interest in Armstrong, the petitioner for the probate. It appears, however, from the petition which Armstrong presented, that he had an interest, for he represents himself as being guardian of this plaintiff, who was an infant, and claimed title to land through the will. If the fact was as he represented, his interest was unquestionable. (*Mower's Appeal*, 48 Mich. 441.) This seems to be conceded; and the objection is, not that he did not show his interest by his

allegations, but that it does not appear that he proved it. To this the sufficient reply is that the contrary does not appear. The probate courts of this State are courts of general, and for the most part of exclusive, jurisdiction in probate matters (*People v. Wayne Circuit Court*, 11 Mich. 393; *Woods v. Monroe*, 17 Mich. 238; *Church v. Holcomb*, 45 Mich. 29); and their orders and decrees are not to be collaterally attacked on any assumption that they may have exercised their jurisdiction without evidence to support the allegations. All presumptions are that their action, when properly invoked, is rightful; and a contrary presumption would be particularly unreasonable in a case like the present, where, if Armstrong was guardian, as he claimed to be, it is highly probable he was appointed such guardian by this very court, so that the record evidence of the fact would be before the judge to whom the petition for probate was presented, and who in that case would take judicial notice of the fact. But if the appointment had been made elsewhere, there is nothing in this record to show that proof of it was not duly made, and it is consistent with all that appears that the allegations of the petition were duly supported. The action of the probate judge assumed that he was satisfied of their truth; and when his action is collaterally assailed, the presumption in support of it must be that he was satisfied in a legal way and by proper proof.

The case differs essentially from *Besançon v. Brownson* (39 Mich. 388), for in that case there was no showing of interest by the petition. And it may not be improper to remark, though the fact may have no legal significance, that the party now setting up the Michigan probate is one whose interest under it is not disputed, and who, so far as such a thing is possible, may be said to adopt and sanction, as she certainly relies upon, what the party who unquestionably is now rightfully acting for her, assumed then to do.

III. The principal questions in the case arise on the will of Elva Dieffenbacher, who, after providing for the payment of debts and funeral expenses and making a small specific gift, gave to her mother Elizabeth Dieffenbacher, under whom the defendant claims, all the rest, remainder and residue of her

property, of whatever nature, for and during her natural life ; and in case the use of the property should be insufficient for her support, then and in that case authorized her to dispose of such and so much of the property as should be sufficient for that purpose. The position is taken that by this gift Elizabeth Dieffenbacker took a fee in the lands ; but this we do not concur in. She had a life-estate only, with conditional power of disposal. (*Terry v. Wiggins*, 47 N. Y. 512 ; *Minot v. Prescott*, 14 Mass. 496.)

The power to dispose of the property was conditioned upon the use thereof being insufficient for the beneficiary's support. The plaintiff contends that the general rule that real property is only to be resorted to when the personalty is exhausted is applicable to such a gift ; and, therefore, the contingency in which the power to dispose of the real estate might be exercised never occurred ; it appearing that the executor of Elva Dieffenbacker had money on hand applicable to the support of Mrs. Dieffenbacker, both at the time when she assumed to execute the power of sale, and also at the time of her death. It is also urged for the plaintiff that Mrs. Dieffenbacker could not be the judge of the necessity of making sale of the land, but that the necessity must appear to have existed as a fact. (*Minot v. Prescott*, 14 Mass. 496 ; *Stevens v. Winship*, 1 Pick. 317 ; *Larned v. Bridge*, 17 Pick. 339 ; *Paine v. Barnes*, 100 Mass. 470 ; *Hull v. Culver*, 34 Conn. 403 ; *Henderson v. Blackburn*, 104 Ill. 227 ; *Warren v. Webb*, 68 Me. 133.) On the other hand it is contended for the defendant that Mrs. Dieffenbacker under the will had no more and no different authority to dispose of the personalty than of the realty ; the condition was single and applied equally to both ; she was absolutely entitled to the use of both, and to dispose of the property, real as much as personal, when the use should prove insufficient. And this seems to be warranted by the phraseology of the will.

But whatever might be the construction of the will if the personalty were anything besides money, it would be an unreasonable and wholly unwarranted construction that would justify an exercise of the power to sell, for the purpose of

raising money, when there was already money on hand with which the object of the testator's bounty could be accomplished. It was her manifest purpose to preserve the body of her estate intact for this plaintiff, unless a sale should be necessary for her mother's support ; and the only purpose that could exist for making any sale would be to produce a fund which could be made use of for such support. If a fund already existed, unappropriated and uninvested, as apparently was the case here, the creation of a further fund, by a sale of either lands or chattels, would, if within the terms of the power, be an abuse of it. But we do not think it could be held to be within its terms. And Mrs. Dieffenbacher apparently must herself have thought she was at liberty to make use of any money on hand, for she proceeded to draw the money from the bank and make use of it immediately after her daughter's death ; a lawless act, in so far as it was accomplished by the unwarranted use of her daughter's name in indorsing the certificate, but not otherwise unwarranted if the money was needed for her support.

But we also think the court had evidence tending to show that the conveyances made by Mrs. Dieffenbacher to defendant were made in fraud of the plaintiff's rights, and by a perversion of the power given by the will instead of being in bona fide execution of it. The defendant had no means to buy lands with, and was not a person to be looked to as a purchaser if a sale for the raising of money was in contemplation ; and a sale to a person without means when ready money was the nominal purpose, must necessarily be suspicious. But the consideration in one case, at least, was grossly inadequate ; and so it was in the other also, unless much importance is attached to the life-lease which was given back. But the transaction in that case looks very much like one fixed up for a purpose different from the one professed.

Complaint is made that the judge refused to find that the completion of an unfinished house which was begun by Elva, and was her mother's home after Elva's death, was a proper expenditure for the mother's support. But the argument for such an expenditure would hold good in support of an expend-

iture for the erection of an entirely new building had Elva left none, or in justification of any particular improvement upon the land which would be calculated to make it more productive. It would apparently have been a very proper and desirable thing for Elva to have provided for the completion of the unfinished house for her mother's occupation but she failed to do so. She merely provided a fund for her mother's support; and the building of a house, in whole or in part, cannot be considered a part of the support of the person who is to occupy it.

No errors appear in the case, and the judgment must be affirmed.

The other justices concurred.

ESTATE OF HOPPER.

[66 California, 80.]

CONSTRUCTION OF A WILL.—INTENTION.

When a testator makes a specific devise of a tract of land, and then sells a portion of the tract, and afterwards repurchases that portion, the whole tract will pass to the devisee on the death of the testator, if it is manifest from the terms of the will that it was the intention of the testator to dispose of all the property which he might own at the time of his death.

APPEAL from a decree of the Superior Court of the county of Napa. The facts appear in the opinion of the court.

Stanly, Stoney & Hayes and *Spencer & Henning*, for appellants.

J. J. May, E. W. McGraw, Crouch & Johnson, and *A. J. Hull*, for respondents.

Ross, J. Charles Hopper, on the first of April, 1868, made his last will and testament, which contained a devise to his son Thomas, in these words: "I give, bequeath and devise to my son, Thomas B. Hopper, that portion of real estate he has inclosed and now has in his possession, supposed to be one hundred and forty (140) acres, more or less." At the date of the will, Thomas B. Hopper had inclosed and in his possession a portion of his father's land, containing about 140 acres. On the 14th of June, 1870, the testator sold and conveyed 18 acres and a fraction of this tract to one Baldwin, which portion for convenience, will be referred to as the Baldwin tract; and on the 21st of February, 1871, sold and conveyed to one Forbes 18 acres thereof. On the 4th of October, 1871, the testator executed a codicil to his will, by which certain provisions of the will were altered, but which did not interfere with the devise to Thomas B. Hopper. On the 19th of July, 1872, the testator repurchased the Baldwin tract, and thereupon entered into possession of it, and remained in possession and seized in fee thereof until his death.

On the 25th of January, 1878, the testator conveyed to his son Thomas, by deed, that portion of the property devised to him not embraced in the conveyances to Baldwin and Forbes. After the death of the testator, which occurred on the 24th of September, 1880, his will, with the codicil, was duly admitted to probate, and administration upon his estate duly had. Upon the final distribution of the estate, the question involved in this appeal arose. That question is—Who is entitled to the Baldwin tract; Thomas B. Hopper, or the residuary legatees?

According to the rule of the common law, after-acquired real estate did not pass by a will. And this rule was enforced so strictly, that a will was held to be inoperative upon real estate of which the testator was the owner at the time of the making of the will, and afterwards sold, repurchased, and died seized—which is the exact case at bar. Tested, therefore, by the rule of the common law, it is plain that Thomas B. Hopper would not be entitled to the disputed premises. But in this State, as in many others, that rule has been changed by statute.

Section 22 of the Act of April 10, 1850, as amended in 1866 (Stats. 1865-6, 381), provides: "Any estate, right, or interest in lands acquired by the testator after the making of his will, shall pass thereby and in like manner as if (possessed) at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms denoting the intent of the testator to devise, all the real estate of such testator, shall be construed to pass all such real estate which such testator was entitled to devise at the time of the decease of such testator."

If, therefore, from a fair reading of the will in question, it appears that it was the intent of the testator thereby to devise all of the property of which he should die seized, it is within the operation of the statute to give effect to that intention. (Redfield on Wills, vol. 1, pp. 333, 338, 4th ed.; *Brimmer v. Sohler*, 1 Cush. 132; *Winchester v. Forster*, 3 Cush. 369; *Liggat v. Hart*, 23 Mo. 127; *Quinn v. Hardenbrook*, 54 N. Y. 87.) "Every testator is aware," as said in *Brimmer v. Sohler* (*supra*), "that his will cannot take effect until after his death; that, until that event, all his property remains at his disposal; and, ordinarily, it is from that period that his intention to settle its final distribution may be presumed." But the language of the will we are considering makes manifest the intent of the testator to dispose thereby of all of the property he might own at his death. By it he first directs payment of all his legal debts, after which he devises and bequeaths to his wife all the real estate, money and other property "which may remain after satisfying the following provision, for her sole use and benefit, during the term of her natural life, to be disposed of at her death as hereinafter mentioned." The provisions to be satisfied, according to the terms of the will, before the devise and bequest to the wife becomes effective, are certain specific devises, among which is the one to Thomas B. Hopper. After these specific devises are satisfied and the debts paid, all of the remaining property is to go to the widow during her natural life, and afterwards as further directed by the testator.

We think the language of the will clearly denotes the intention of the testator to dispose of all of the property he should leave at the time of his death ; and as he owned the property in question at that time, and as by the terms of the will it is devised to Thomas B. Hopper, he is entitled to have it awarded to him in and by the decree of distribution.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

McKINSTRY, J., and McKEE, J., concurred.

ESTATE OF KIDDER.

[66 California, 487.]

FRAUDULENT DESTRUCTION OF A WILL.—EVIDENCE TO PROVE CONTENTS.

The evidence showed that at the time of the destruction of the will the testatrix was very ill in bed, and in a semi-comatose condition ; her attendant handed her the will and immediately afterwards she saw it in the fire, but made no attempt to rescue it. Whether the will was thrown into the fire by the testatrix, or accidentally fell there, was not shown : *Held*, that the evidence did not prove a fraudulent destruction of the will by the attendant.

APPEAL from an order of the Superior Court of Santa Clara county.

Burt & Pfister, for appellants.

S. A. Barker, Houghton & Reynolds, and *Moore, Laine & Johnson*, for respondents.

MORRISON, C. J. This is an appeal from an order admitting to probate a destroyed will. The petition alleged the execution of the will, and that it was never revoked by the deceased ;

that on a day and at a place named, and without the knowledge or consent of said deceased, the will "was fraudulently burned and destroyed by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and sole attendant upon said decedent, and that said Mary Kidder died without any information or knowledge of the facts of said burning and destruction thereof." The petition was demurred to, on the ground that the facts constituting a fraudulent destruction are not stated, that it does not appear by whom the alleged will was destroyed, nor what acts contributed to its destruction, nor how the negligence or inattention of the attendant brought about the destruction. The demurrer was overruled.

This proceeding was under section 1339, C. C. P., which provides that "no will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." The ground relied upon by petitioner in this case was that the will had been fraudulently destroyed in the lifetime of the testatrix, Mary Kidder. The averment in that regard in the petition is, "that said last will and testament was fraudulently burned and destroyed by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and sole attendant upon said decedent," and the finding of the court upon the point is, "that when said will was brought to her (the testatrix) she partially withdrew it from the envelope, and then returned it, there and then allowed it to fall from her hand into the fire, when it was wholly consumed. That said destruction of said will was wholly unintentional on the part of said Mary Kidder, . . . and that the wife of Ira Stevens (the nurse) was present at the time said will was burned, and saw it fall into the fire, but did not make any effort to preserve it, and did not inform said Mary Kidder that it had fallen into the fire, or was burned or destroyed."

It will be borne in mind that the petition was for the pro-

bate of a will alleged to have been fraudulently destroyed during the lifetime of the testatrix, and the first inquiry is—Do the allegation in the petition show a fraudulent destruction of the will? It is true that it is charged that the will was fraudulently burned and destroyed “by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and attendant upon the decedent.” What acts of neglect and inattention the nurse was guilty of are not stated, and the court is left to conjecture. It is well settled that when fraud is complained of as the ground of relief, the facts and circumstances constituting the fraud must be stated. It has been so held, and such is unquestionably the well-settled doctrine of this court. (*Goodwin v. Goodwin*, 59 Cal. 562, and authorities there cited.)

The testimony of Laura Stevens, the only witness who was present, and the sole witness who testified to the destruction of the will, was substantially as follows :

“I handed the will to her; she lay it in her hands like that (showing) and kind of sank, and I just walked around the other side of her, and saw it was in the fire. While I was walking, it was in the fire. . . . She made a motion of her hand down on one side, like she was half asleep, and the paper went into the fire and was consumed there. . . . I couldn’t tell whether it was a throwing or flirting around, but it went into the fire. . . . I was going around like, and with that motion the will went into the fire. I couldn’t tell why I didn’t get it out of the fire; I didn’t know anything about it, really; didn’t know what to do, nor really didn’t think about it.”

Does the evidence show, or does the court find facts amounting to fraud, or constituting a fraudulent destruction of the will. The Supreme Court of New York, in a case similar to this, says : “The question of the fraudulent destruction of a will under this section must be one of fact. Fraud is never to be presumed. This is a fundamental rule. It is never to be imputed or inferred, but must be proved by satisfactory evidence.” (*Timon v. Claffy*, 45 Barb. 446.)

The most that can be said of the conduct of Mrs. Stevens

is, that she neglected to take the will from the fire; but to impute to her fraudulent conduct would be more than the evidence justifies. We do not think that the evidence shows or that the court finds a fraudulent destruction of the will, under section 1239 of the Code of Civil Procedure.

From what has been said, it is apparent that the orders appealed from must be reversed; but there are one or two other points in the case to be considered. On an application to have a lost will admitted to probate, the provisions of such will must be clearly and distinctly proved by at least two credible witnesses. Such is the language of section 1339 of the Code, already referred to, and it is claimed by the contestants that such was not done in this case.

The first witness examined as to the contents of the alleged destroyed will was J. E. Brown, who testified as follows: "The first thing was that she wanted Jessie Kidder to have \$1,500. I wrote it down. The next she wanted to give one of her sons \$5. I don't recollect his name. It was not Ira. I wrote down that bequest. She wanted one of her daughters, living in Oregon or Sacramento, I forget which, to have \$1,000. I wrote that. One more daughter she wanted to give \$500; where she lived I don't recollect. I wrote that." The next witness testifying to the contents of the will was Mrs. S. J. Towle, who testified to a bequest therein of \$500 to a son living in Oregon. The witness, on being requested a second time to state the contents of the will, omitted this bequest. . . . "My impression is that the one in Oregon (the daughter in Oregon) was to have the \$1,000, but I would not be positive now; that has been my impression, at least ever since the last trial." Further on in her testimony, this witness speaks for the first time of a reservation in the will of \$500 for funeral expenses.

The foregoing is a fair sample of the testimony on the contents of the will; and can it be said that the contents of the will were clearly and distinctly proved by two witnesses? In *Davis v. Sigourney* (8 Met. 437) Wilde, J., says: "To authorize the probate of a lost will by parol proof of its contents, depending on the recollection of witnesses, the evidence must

be strong, positive and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act upon probabilities." "This strictness is requisite, in order that courts may be sure that they are giving effect to the will of the deceased, and not making a will for him." (*Matter of Johnson's Will*, 40 Conn. 589.)

We do not think the evidence given of the contents of the will in this case of such a character as comes up to the requirement of the statute, or the rule laid down in the foregoing cases.

The objection to the credibility or the competency of the witnesses on the ground of interest was not well taken.

Orders reversed and cause remanded for a new trial.

McKEE, J., McKINSTEY, J., SHARPSTEIN, J., THORNTON, J., and ROSS, J., concurred.

Rehearing denied.

WEBSTER vs. MORRIS.

[66 Wisconsin, 366.]

BEQUEST FOR CHARITABLE PURPOSES.—INDEFINITENESS.—PRECATORY WORDS.—PERPETUITIES.

A bequest was made to the "Omro and Algoma Union Cemetery Association of Omro." There was no corporation of that name, but there were corporations called respectively the "Omro Cemetery Association" and the "Union Cemetery Association," both having grounds in Omro. The members and incorporators of the latter included inhabitants of the towns of Omro and Algoma. *Held*, that extrinsic evidence of the above facts was admissible, and that the last-named corporation was the one intended.

A bequest of a sum not exceeding \$2,000 to a cemetery association "for the purpose of assisting in building a chapel on or near the cemetery grounds," with a direction that if the association will not build such chapel then it use the income from the sum bequeathed in improving the grounds, is valid.

A bequest of money was made to the "First Presbyterian Church of the Village of Omro," with directions that the sum bequeathed be kept as a perpetual fund for the use of said society, and that one half of the interest arising therefrom be used in defraying the expenses of the society, "and the balance distributed and used for the relief of the resident poor." *Held*,

(1) Extrinsic evidence was admissible to show that the "First Presbyterian Society of the Town of Omro" was intended.

(2) A beneficial interest vested at once in the church corporation, and the bequest violates no rule against perpetuities.

(3) The direction as to the relief of the resident poor was for a charitable purpose, referred to residents of the town of Omro and of the village included within its limits, and was sufficiently definite and certain to be carried into execution.

A bequest was made to the testator's grandson, the income of which was to be used for his support until a certain age, when the principal sum was to be paid to him "provided he has in the meantime learned some useful trade, business, or profession, and is of good moral character; my executors to determine whether said child has fully complied with said proviso," &c. *Held*, that the condition is not indefinite or uncertain, is not contrary to good morals or public policy, and is valid.

A direction that upon a contingency mentioned a certain sum be expended by the executors "for charitable purposes" at large, is too indefinite to be executed.

Where a bequest is for two or more alternative uses of a charitable nature, and one of them is void for uncertainty, the whole gift does not therefore fail.

Where a will treats the whole estate as personal property, directing the payment of all gifts in money, the executors have authority, by necessary implication, to convert real estate into money.

Executors should administer the estate according to the will, although the duties thereby imposed include such as are usually performed by trustees.

APPEALS from the Circuit Court for Winnebago County.

The following statement of the case was prepared by Mr. Justice Cassoday :

This action was commenced in the Circuit Court for the construction of the last will and testament of Hiram W. Webster, deceased, and for the advice and directions of the court upon certain questions submitted, and for such other or further instructions thereon respecting the execution of the trusts thereby imposed as may seem proper. The will was duly executed, and is in the words and figures following, to wit :

"I, Hiram W. Webster, of the village of Omro, Winnebago county, State of Wisconsin, being of sound mind and mem-

ory, and mindful of the uncertainties of human life, do make, publish, and declare this my last will and testament, hereby revoking all former wills, bequests, and devises by me made.

"First. It is my will that all my just debts, funeral expenses, and all other charges be paid out of my estate.

"Second. I give, devise, and bequeath to my beloved wife, Louisa M., the sum of ten thousand dollars, to be paid out of my estate.

"Third. I further give, devise, and bequeath to my beloved wife, Louisa M., my homestead of about six acres of land, known as 'Outlot No. seventy-five (75),' south of Fox river, in the village of Omro, Winnebago county, State of Wisconsin, together with all the appurtenances thereto belonging.

"Fourth. I give, devise, and bequeath to my beloved wife, Louisa M., all the household furniture, beds, bedding, books, works of art, and other chattels, jewels, trinkets, personal ornaments worn or used by me or her, fuel, housekeeping provisions, and other consumable stores which shall be in or about my dwelling-house in said village of Omro at my decease, except money, securities for money, evidences of debts and of title, and accounts; and I also give, devise, and bequeath to my beloved wife, Louisa M., my carriage horse, carriage, sleigh, harnesses, robes, bells, and cow, and the hay and grain on hand for feeding said horse and cow, which, with what I have heretofore given to her in this, my will, I mean to be, and that she, my beloved wife, Louisa M., accept the same, in full of her right of dower or third in my estate, and I give to her as above upon the express condition that she, my beloved wife, Louisa M., shall give to my executors, when demanded, a release of all demands and claims of dower or thirds and otherwise of and against my estate, save what I have herein given her, except certain promissory notes which my beloved wife, Louisa M., now holds, or which she may hold against me at my decease, which I will, wish, and direct shall be considered and treated a proper debt and claim in her favor against my estate, and the amount of said promissory notes paid her out of my estate.

"Fifth. I give, devise, and bequeath out of my estate not

hereinbefore disposed of, to Hiram W. Morris, my grandson, and son of Delphina and M. D. Morris, the sum of ten thousand dollars; said sum to be invested and put to use, and the interest arising therefrom, or so much as said child's guardian and my executors, hereinafter mentioned, may consider proper and necessary, be used for the support and education of said child, and at his majority the unexpended interest from said principal sum be paid him, and the interest on said sum annually thereafter until he arrives at the age of thirty years, at which time I will and direct that my executors pay to said Hiram Webster one half of said ten thousand dollars, and one thousand dollars each year thereafter, together with all interest earned, until the balance of said ten thousand dollars hereby willed to him has been paid: provided, however, that said Hiram Webster has in the meantime learned some useful trade, business, or profession, and is of good moral character, my executors to determine whether said child has fully complied with said proviso before any payments from the principal sum are made to him.

"*Sixth.* I give, devise, and bequeath to Edward Morris, my grandson, and son of Delphina and M. D. Morris, the sum of ten thousand dollars; said sum to be invested and put to use, and the interest arising therefrom, or so much as said child's guardian and my executors, hereinafter mentioned, may consider proper and necessary, be used for the support and education of said child, and at his majority the unexpended interest from said principal sum be paid him, and the interest on said sum annually thereafter, until he arrives at the age of thirty years, at which time I will and direct that my executors pay to said Edward Morris one half of said ten thousand dollars, and one thousand dollars each year thereafter, together with all interest earned, until the balance of said ten thousand dollars hereby willed to him has been paid: provided, however, that said Edward Morris has in the meantime learned some useful trade, business, or profession, and is of good moral character, my executors to determine whether said child has fully complied with said proviso before any payments from the principal sum are made to him.

"*Seventh.* I will and direct that in case of the death of either child without leaving an heir, and before the said legacies are paid to them or either of them, that the surviving one shall be considered the first heir and have the share of the deceased one, under the same restrictions and upon the same conditions provided for said deceased one's share; but, in case of the death of both without leaving an heir, all remaining payments and legacies to revert back to my estate, and to be expended by my executors for charitable purposes, or given to any of my heirs who are in need or not in very comfortable circumstances, as to my executors seems fit and proper.

"*Eighth.* I give, devise, and bequeath to my son-in-law, M. D. Morris, one certain promissory note for one thousand dollars, given by him to me, dated November 29, 1878.

"*Ninth.* I give, devise, and bequeath to David Hudson, of Hampton, Washington county, State of New York, the annual interest of two thousand dollars during his life, said annuity to be paid him annually; and it is my will and I direct my executors to put and keep said sum of two thousand dollars at interest at the best rate obtainable, reference being had to good security; and at his death I give, devise, and bequeath said sum of two thousand dollars to Amanda Rice, wife of John Rice, of the village of Omro, Winnebago county, State of Wisconsin.

"*Tenth.* I give, devise, and bequeath to Lyman Coleman, of Castile, Wyoming county, State of New York, Henry Stearns, and Betsy Marshall, wife of Edwin Marshall, of Omro, Winnebago county, State of Wisconsin, each the sum of five hundred dollars.

"*Eleventh.* I give, devise, and bequeath to my three sisters, Anna Martin, of Pike, Emily L. Stearns, of Warsaw, Isabel Broughton, of Covington, all of Wyoming county, State of New York, each one thousand dollars; and the surviving children of Lucy Hotchkiss, wife of Cornelius Hotchkiss, of Erie county, State of Pennsylvania, one thousand dollars, to be equally divided between them.

"*Twelfth.* I give, devise, and bequeath to the Omro and Algoma Union Cemetery Association, of Omro, Winnebago

county, State of Wisconsin, the sum of one thousand dollars ; which said sum I will and direct to be paid over to the proper officers of said association, for the purpose of assisting in building a chapel on or near the said association cemetery grounds, to be built of brick or stone, with a seating capacity to accommodate two hundred persons ; but, in case said association will not build said chapel, then I direct and will the said sum of one thousand dollars to said association upon the express condition that said association put said one thousand dollars to use, and the annual interest arising therefrom be used by said association in improving their cemetery grounds.

“ Thirteenth. I give, devise, and bequeath to the First Presbyterian Church, of the village of Omro, Winnebago county, State of Wisconsin, the sum of ten thousand dollars, upon the following conditions, to wit: That said sum be kept as a perpetual fund for the use of said society, and the interest arising therefrom, one half to be used by said society in defraying the annual expenses, and the balance distributed and used for the relief of the resident poor.

“ Fourteenth. It is my will, and I hereby instruct my executors, that one third interest in the partnership business of the firm of Webster & Co., of the village of Omro, remain in said business according to the terms and conditions of a certain contract between me, Henry Scott, and E. C. Jones.

“ Fifteenth. It is my will, and I direct, that in case my estate exceeds the legacies mentioned in this, my will, that the surplus or remainder of my estate be appropriated and used by my executors in aid or encouragement of charitable purposes ; and if in their judgment there should be a sufficient amount of said surplus, I would recommend that the same be used to establish a school in Omro, or some place in Winnebago county, Wisconsin, for the education of young persons in the domestic and useful arts ; but in case there is not enough of my estate to meet the above legacies, that the deficit may be borne *pro rata* between the legatees, except my beloved Louisa M.

“ Sixteenth. I will and direct that all legacies to my beloved wife, Louisa M., be paid in full.

"Seventeenth. All legacies and bequests mentioned in this, my will, I will and direct be paid out of my estate within five years from my death, without paying any interest on said legacies.

"Eighteenth. I hereby nominate and appoint my beloved wife, Louisa M., Edward Sargent, and E. R. Hicks, of Winnebago county, Wisconsin, the executors of this, my last will and testament; and hereby authorize and empower them to compound, compromise, and settle any claim or demand which may be in favor or against my said estate, and to do and perform all things necessary and proper in the premises to carry out this, my will.

"In witness whereof, I have hereunto set my hand and seal this twenty-eighth day of November, 1883.

"HIRAM W. WEBSTER." [Seal.]

The court found that the testator died May 14, 1884; that Louisa M. Webster was the widow of the testator; that Edward Morris died before the testator; that Hiram W. Morris was an infant grandson of the testator, and his sole next of kin or heir at law; that M. D. Morris was his father; that the copartnership mentioned in the fourteenth paragraph of the will expires by the terms of the contract in May, 1888; and that the debts of the testator amount to \$22,551.03. The estate is said to consist of about \$20,000 of real estate, and about \$155,000 of personal property.

As conclusions of law the court found, in effect, that the real estate did not pass by the will, but descended to the surviving grandson; that the executors were to retain the legacies mentioned in the fifth, sixth, and seventh paragraphs of the will in trust, but that said grandson had a vested interest therein; that their discretionary power over the same, mentioned in the fifth and sixth paragraphs, and the contingent disposition mentioned in the seventh, in case of the death of both grandsons, were so vague and indefinite as to be wholly void, and hence such trust fund would, in case of the death of both of them, go to the executors; that the residuary provisions in the fifteenth paragraph were void for uncertainty; that the other bequests were valid; and that the personal

estate which did not pass by the will should be distributed under the statutes.

George Gary and E. R. Hicks, for plaintiffs.

Moses Hooper, for defendants.

CASSODAY, J. There is no bill of exceptions. The questions involved arise upon the face of the will, under the facts found by the court. No question is made as to the meaning or validity of paragraphs numbered 1, 2, 3, 4, 8, 9, 10, 11, 14, 16, 17, and 18 of the will. The other paragraphs only will be considered, and they not in the order in which they are named, but more in reference to their relations with each other.

1. In regard to the twelfth paragraph of the will, it was found by the trial court, as a matter of fact, that there was no corporation known as "The Omro and Algoma Union Cemetery Association," but that there was and is a corporation called the "Omro Cemetery Association," having cemetery grounds in said town of Omro; and also another corporation named "The Union Cemetery Association," having grounds in said town of Omro, and that the members and incorporators thereof included inhabitants of the towns of Omro and Algoma; and that the deceased members of the testator's family who died during his life were buried in "The Union Cemetery Association" aforesaid; and that said testator was also buried there. As a conclusion of law the trial court found that, by said twelfth paragraph of the will, the testator intended to give, and did give, the legacy of \$1,000 therein mentioned to "The Union Cemetery Association" aforesaid, in trust for the alternative purposes mentioned, to be executed by the proper officers of said last-named corporation according to the conditions named in the will. We are clearly of the opinion that this was the true construction, and that the bequest is valid. There can be no doubt but what extrinsic evidence was admissible to show which of the two cemetery associations was intended. (*State ex rel. State Agr. Soc. v. Timme*, 56 Wis. 423; *Begg v. Begg*, 56 Wis. 534; *Scott v.*

West, 63 Wis. 551; *Begg v. Anderson*, 64 Wis. 207; *Cleveland v. Burnham*, 64 Wis. 355; *In re Brake*, 32 Eng. [Moak], 601; *Brownfield v. Brownfield*, 51 Am. Dec. 590; *Harokins v. Garland's Adm'r*, 44 Am. Rep. 158; *Tilton v. Am. Bible Soc.*, 49 Am. Rep. 321; *Newell's Appeal*, 24 Pa. St. 197; *Minot v. Boston Asylum & F. S.*, 7 Met. 416; *Howard v. Am. P. Soc.*, 49 Me. 288; *Lefevre v. Lefevre*, 59 N. Y. 434; *Patch v. White*, 117 U. S. 210.) Such evidence removed the latent ambiguity which otherwise would have existed. (*Ibid.*)

We have no doubt of the validity of that bequest. The corporation was capable of taking the beneficial interest in the bequest "for the purpose of assisting in building a chapel," as indicated. The statutes expressly authorize such corporations to take personal property by gift, to an amount not exceeding \$10,000 in value, to be applied to promote the objects of the association. (§ 1447, R. S.; ch. 42, Laws of 1882; ch. 165, Laws of 1885.) The building of such chapel would certainly promote such objects. Under the statute as amended, "express trusts may be created," moreover (6), for "perpetually keeping in *repair* and *preserving* any tomb, monument, or grave-stone, or any cemetery, to an amount not exceeding two thousand dollars; and any cemetery company, association, or corporation is authorized to receive money or property to the amount aforesaid, in trust for the purpose aforesaid, and to apply the income thereof to the purposes of the trust." (§ 2081, R. S.; ch. 290, Laws of 1883.) The bequest is within the amount named. If the association fails to build the chapel, then, under the will, it is to take the bequest in trust, and put it out at interest, and the annual interest arising therefrom is to be used by the association in improving the cemetery grounds. This is expressly sanctioned by this amendment to the statute.

2. In regard to the thirteenth paragraph of the will, it was found by the trial court that there was no corporation or society named the "First Presbyterian Church of the Village of Omro," but that there was and is an incorporated religious society named "The First Presbyterian Society of the Town of Omro," with its church edifice in the village of Omro, in

said town, and of which the testator was a member, and to the support of which he contributed, and that there was and is no other Presbyterian church or society in said town of Omro. As a conclusion of law, the trial court found that by said thirteenth paragraph of the will the testator intended to give the legacy of \$10,000 therein mentioned to the "First Presbyterian Society of the Town of Omro;" that the same was and is an effectual bequest to said society, in trust for the purposes named therein; and that said trust is to be executed by the trustees of said society; and that by the words "the resident poor," at the close of said thirteenth paragraph, was and is intended poor persons at any time needing charitable relief, who are at such time residents of said town of Omro.

From what has already been said respecting the Omro Cemetery Association, it is obvious that extrinsic evidence was admissible to show the particular church or society intended, and thus remove the latent ambiguity otherwise existing. The bequest is directly to the society, with the directions "that said sum be kept as a perpetual fund for the use of said society, and the interest arising therefrom one half to be used by said society in defraying the annual expenses, and the balance distributed and used for the relief of the resident poor." By this clause the testator manifestly intended to create a trust in the church corporation "for the beneficial interests of" the church and the "resident poor" of the town. By the language thus employed, such trust was "fully expressed and clearly defined upon the face of the instrument creating it," and hence satisfied the requirements of subd. 5, § 2081, R. S. Still, by the express language of that subdivision, such trust is "subject to the limitations *as to time*, and the exceptions thereto relating to literary and charitable corporations, prescribed in this (twentieth) title." "The limitation as to time" here mentioned refers to the statute declaring that "the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate." (§ 2039, R. S.) "The exceptions thereto" mentioned, apply "when real estate is given, granted, or

devised to literary or charitable corporations which shall have been organized under the laws of this State, for their sole use and benefit." (*Ibid.*) This court has held that a religious corporation, such as the trustees of a church, is not a charitable corporation, within the meaning of this statute. (*De Wolf v. Lawson*, 61 Wis. 469.) "There can be no question but the statute refers to real estate alone." (*Id.* 474.)

In *Dodge v. Williams* (46 Wis. 70), the will contemplated the conversion of all the testator's realty into personalty by his executors, and then that the several trusts created thereby should be executed in personalty exclusively. In other words, the estate was treated as personal property, upon the doctrine of equitable conversion. But three of the bequests were to literary corporations expressly authorized to take in perpetuity by both sections of the statute cited, and another bequest was for the benefit of another corporation to be thereafter incorporated. In that case the late chief justice said that "the English doctrine of perpetuities applied to estates both real and personal, and grew up by a series of judicial decisions;" but that in this State "the statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty. *Expressio unius est exclusio alterius.*" (Pages 95, 96.) These expressions of the late chief justice are referred to by the present chief justice in *De Wolf v. Lawson* (61 Wis. 474), where he expressed doubt as to their being "strictly accurate." He then mentioned several reasons given by the courts in support of the common-law doctrine as applied to personal property, and cites several text-books in support of such reasons, and concludes: "This common rule of perpetuity as to personalty may be unaffected by our statute."

In Gray's Rule against Perpetuities, just published, there is a pretty full discussion of the question. The rule is there said to "owe its birth, and the shape it has assumed, to executory devises of chattels real. . . . The natural, the original meaning of a perpetuity, is an inalienable, indestructible interest. The second, artificial meaning is *an interest which will not vest till a remote period.* The latter is the meaning which

is attached to the term when the rule against perpetuities is spoken of. . . . It is to be regretted that the rule has not become known as the rule against remoteness. More than one erroneous decision would probably have been then escaped." (§§ 140, 589, 590, *et seq.*) The learned author also said: "Whether future interests in a chattel remaining in the grantor, or limited over to a third person after a present gift, are within the rule against perpetuities or not, depends upon whether, for the purposes of the rule, they are to be deemed *vested or contingent*. All such interests, if contingent, are within the rule." (§§ 117, 320, 321, and cases there cited.) But "a vested interest is not subject to the rule against perpetuities, for, *ex vi termini*, it is not subject to a condition precedent." (§ 205.)

The question when a bequest or legacy of personalty becomes vested, or is contingent, was pretty fully discussed, and numerous authorities cited, in the recent case of *Scott v. West* (63 Wis. 565, 566, 571-573), where a similar distinction was made as to remainders. The following conclusions were there reached: "Bequests of legacies and personal property, when the payment or distribution is to be made at a future time, certain to arrive, and not subject to a condition precedent, are deemed vested when there is a person in being at the time of the testator's death capable of taking when the time arrives, even though his interest is liable to be divested by dying without issue, or diminished by future births." (See, also, *Pond v. Allen*, 4 East. Rep. 137.) "In such cases the legacy or bequest takes effect, in point of right, on the death of the testator." (Page 571.) "On the other hand, legacies only payable on an event which may never happen, and hence subject to a condition precedent, are contingent." (Page 566.) Here the bequest to the church was not in any sense contingent, but immediately vested a beneficial interest in the church corporation. (*Scotney v. Lomer*, L. R. 29 Ch. Div. 535.) This being so, the rule against perpetuities or remoteness does not apply. (See, also, *Hawkins*, 183, 206, 215, 224, and cases there cited.)

The direction in the clause of the will quoted, to distribute and use one half of the annual income of the bequest "for the

relief of the resident poor" of the town, was clearly a charitable purpose. It included those who should be resident of the village as well as the town, and was sufficiently definite and certain to be carried into execution. (*Howard v. Am. P. Soc.*, 49 Me. 288; 2 Redf. on Wills, 504, subd. 15; *Swoasey v. Am. B. Soc.*, 57 Me. 523; *McIntire's Adm'rs v. Zanesville*, 17 Ohio St. 352; *Hesketh v. Murphy*, 36 N. J. Eq. 304; s. c., 26 Alb. Law J. 28, and 21 Am. Law Reg. 659; *State v. Griffith*, 2 Del. Ch. 392; *Ex parte Lindley*, 32 Ind. 367; *Craig v. Secrist*, 54 Ind. 419; *Shotwell v. Mott*, 2 Sandf. Ch. 46; 2 Perry on Trusts, 698.) It was as definite and certain as "the annual income thereof to apply and use for the education and tuition of worthy indigent females," in *Dodge v. Williams*, *supra*. It is certainly distinguishable from the bequest to the unascertained and unascertainable "Roman Catholic orphans of the diocese of La Crosse," as in *Heiss v. Murphey*, 40 Wis. 276.

3. The grandson Edward Morris, mentioned in the sixth paragraph of the will, having died without issue and before the testator, died "without leaving an heir," within the meaning of the seventh paragraph of the will; and the bequest, which would otherwise have gone to him under the sixth paragraph of the will, now goes, under the seventh paragraph of the will, to the surviving grandson, Hiram W. Morris, under the same restrictions and upon the same conditions as to him, if valid, as was provided for said Edward had he continued to live; that is to say, said Hiram W. so takes what would otherwise go to said Edward under the same restrictions and upon the same conditions, if valid, as are applicable to the bequest to said Hiram W. under the fifth paragraph of the will. In other words, it is the same, in effect, as though the amount named in the fifth paragraph had been twenty thousand dollars instead of ten. So construed, the words "first heir," in the seventh paragraph, had the effect of carrying the bequest to Edward, on his death, over to Hiram W. The result is that \$20,000 of said estate is to be invested and put to use, and the interest arising therefrom, or so much as said Hiram W.'s guardian and the executors named in the will may consider

proper and necessary, be used for his support and education; and at his majority the unexpended interest from said \$20,000 be paid to him; and also the interest on said sum annually thereafter, until he arrives at the age of thirty years; at which time one half of the \$20,000 is to be paid over to him, and \$2,000 each year thereafter, together with all interest earned, until the balance of said \$20,000 be paid to him; unless the payment of such principal sum is defeated by his failure to perform the conditions therein provided, which will now be considered. Such trusts were in contemplation of the statutes, and hence permissible, even as to real estate. (§ 2081, R. S.; *Scott v. West*, 63 Wis. 561.) They were certainly permissible as to personal property. The bequests were vested upon the principles stated, and hence not subject to the doctrine of perpetuities or remoteness.

4. The condition annexed to the bequest is that "provided, however, that said Hiram Webster Morris has in the meantime learned some useful trade, business, or profession, and is of good moral character; my executors to determine whether said child has fully complied with said proviso before any payments from the *principal sum* are made to him." The argument against the validity of this condition is that it is *in terrorem*, or against public policy. The authorities, however, seem to be strongly the other way. This is on the theory that every person has a legal right to dispose of his own property as he sees fit. Thus, conditions annexed to a devise or bequest from a husband to a wife, or a wife to a husband, to be held only so long as he or she remains unmarried, are quite common, and have frequently been held valid. (*Allen v. Jackson*, L. R. 1 Ch. Div. 399, reversing the same case in 19 Eq. Cas. 631; *Pringle v. Dunkley*, 53 Am. Dec. 110; *Bostick v. Blades*, 59 Md. 231; s. c., 43 Am. Rep. 548.) So, conditions that the devisee or legatee shall not marry prior to arriving at a particular age, without the consent of a person named, have been held valid. (*Scott v. Tyler*, 2 Brown's Ch. 431; *Stackpole v. Beaumont*, 3 Ves. Jr. 97; *Hogan v. Curtin*, 88 N. Y. 162; s. c., 42 Am. Rep. 244.) The age named must, of course, be reasonable; as, for instance, twenty-one years of age. But a

condition annexed to a devise or bequest from parent to child in absolute restraint of marriage, has been held void, as against public policy. (*Williams v. Cowden*, 13 Mo. 211; s. c., 53 Am. Dec. 143; *Randall v. Marble*, 69 Me. 310; *Otis v. Prince*, 10 Gray, 581.) The same has been held where the devise or bequest was to a widow from her husband, and there was no gift over in case of breach of the condition. (*Parsons v. Winslow*, 6 Mass. 169; s. c., 4 Am. Dec. 107, and notes; *Crawford v. Thompson*, 91 Ind. 266; s. c., 46 Am. Rep. 598.)

In *Cooke v. Turner* (14 Sim. 493), the will contained a gift over in case the legatee should dispute the will or the testator's competency to make it, or should not confirm it when required by the trustees; and the condition was held valid.

In *Dickson's Trust* (1 Sim. Ch. 37), the testator, by a codicil, annexed a condition to the bequest to his daughter to the effect that she should not take in case she became a nun, which she did; and it was held by Lord Cranworth that the condition was lawful, notwithstanding there was no gift over on its breach.

That case was followed in *Hodgson v. Halford* (L. R. 11 Ch. Div. 959; s. c., 32 Eng. [Moak], 918), where the condition annexed to the legacy was, in effect, that it should be forfeited in case the legatee married any person who was not a born Jew, professing the Jewish religion; and it was held valid, and not against public policy. It was there said that all the authorities holding the other way were "cases in which the condition was unquestionably against public morality, and it was on that ground that the court declined to give effect to it."

In the very recent case of *Delany v. Delany* (L. R. [Ireland] 15 Ch. Div. 55) the will provided: "If my said son Andrew shall in all respects conduct himself to the satisfaction of my executors, I bequeath to him a sum of 2,000 pounds, to be paid when my son Henry shall attain (or would have attained) his age of twenty-one years." He also devised and bequeathed the residue of his property to his executors, upon trust for the use and benefit of all his children, including his son Andrew, in equal shares; and declared that "if it should

happen that my said son Andrew shall not conduct himself in all respects to the satisfaction of my said executors, or the survivor of them, then I declare that he shall not be entitled to receive any portion of my said residuary estate ; and in that case a declaration in writing, signed by my said executors, or the survivor of them, of their, her, or his dissatisfaction with him, shall be conclusive evidence that he is not to receive any portion thereof, and the share to which he would otherwise be entitled shall thereupon go to, and be distributed among, my other children in equal shares." The executors who had qualified certified that Andrew had not conducted himself to their satisfaction, and he made no denial of his misconduct. The condition was held valid.

In *Vidal v. Girard's Ex'rs* (2 How. 128), it was held, in effect, that the provision in Mr. Girard's will excluding all ecclesiastics, missionaries, and ministers, of any sort, from holding or exercising any station or duty in the college, or even visiting the same, with the limitation of the instruction to be given to the scholars to pure morality, general benevolence, a love of truth, sobriety, and industry, were not so derogatory and hostile to the Christian religion as to make the devise void, under the constitution and laws of Pennsylvania.

It was recently held, in effect, in Maryland, that a bequest dependent upon the condition that the legatee should withdraw from the priesthood of the Roman Catholic Church, or membership of any order or society connected with such church, or refrain from forming any such connections, was held to be valid, and not against public policy, on the ground that whatever might be thought of the opinions of the testator, or his prejudices, the law recognized his right to make the enjoyment of his bounty dependent upon such conditions. (*Barnum v. Mayor of Baltimore*, 62 Md. 291.)

So, it has recently been held that a bequest on condition that the beneficiary shall be educated in the Roman Catholic faith, is not uncertain, impossible, nor against public policy, nor unconstitutional. (*Magee v. O'Neill*, 45 Am. Rep. 765.)

Here the principal sum bequeathed is to remain in the

possession of the executors until the legatee becomes thirty years of age. His right to it at that time, and thereafter, is made dependent upon his being of good moral character and having in the meantime learned some useful trade, business, or profession, in the judgment of the executors. Without committing ourselves to the doctrine of all the cases cited, especially such as may be regarded as touching matters of conscience, we must hold that the clause in question is capable of performance by any person of ordinary intelligence, and not contrary to public policy. It is designed to put the beneficiary under wholesome restraint. It is not in contravention of good morals, nor any law, nor any matter of conscience, but is promotive of good moral character. It is in no sense indefinite nor uncertain. It is left to the determination of executors; but that does not give them the right to exercise an arbitrary power of exclusion, but only a reasonable exercise of judgment. Manifestly, the bequest to Hiram W. Morris is not to be held void on the ground of the probability or improbability of the contingency on which it is limited to take effect. (§ 2050, R. S.; *Scott v. West*, 63 Wis. 595.) The condition must therefore be held legal and binding.

5. The seventh paragraph of the will provides, in effect, that "in case of the death of both" Edward Morris and Hiram W. Morris "without" issue, then "all remaining payments and legacies" mentioned in the fifth, sixth, and seventh paragraphs of the will are to revert back to the estate, and be expended by the "executors for charitable purposes, or given to any of the testator's heirs who may be in need, or not in very comfortable circumstances, as to" said executors may seem fit and proper. Here are two alternative methods of expending such payments in case of the death of Hiram W. Morris before he reaches thirty years of age. The first is "for charitable purposes" generally. An elaborate argument was made by counsel to the effect that although a bequest for such charitable purposes generally might have been carried into effect in England under ch. 4, 43 Eliz., yet that it cannot be carried into effect in this State, for the reason that that statute, and all other English statutes, were expressly repealed

by our Territorial Statutes of 1839, p. 407, § 8. It is said that the numerous references to such English statutes as being in force in this State, in the decisions of this court, are all erroneous, and made through inadvertence. The conclusion we have reached in this case renders it unnecessary to determine that question here; but, in view of the discussion on both sides, it may not be out of place to make a few general observations in regard to it.

§ 8, p. 407, Laws of 1839, declared that "none of the statutes of Great Britain shall be considered as law of this territory, nor shall they be deemed to have had any force or effect in this territory since July 4, 1816." This same section was re-enacted in Iowa, July 30, 1840. The Supreme Court of that State, after suggesting the grave results of eliminating from the common law all of the old English statutes by reason of that section, finally concluded that the "statutes of Great Britain" therein mentioned did not include English statutes proper, which were enacted prior to "the union of the crown of England with that of Scotland" by act of Parliament in 1707, which was more than 100 years after the statute of Elizabeth. The statute of Elizabeth was, in fact, enacted prior to the accession of James, who was the first to recognize any such union. (*O'Ferrall v. Simplot*, 4 Iowa, 381.) This Iowa case was cited with approval by Mr. Justice Paine in *Coburn v. Harvey* (18 Wis. 150), although a later date was there fixed, and the precise point here presented was not considered. In addition to cases cited by counsel, see cases cited in 21 Am. Law Reg. 553-574. But as held in *Ruth v. Oberbrunner* (40 Wis. 238), *Heiss v. Murphey* (40 Wis. 276), and *Dodge v. Williams* (46 Wis. 70), the *cy pres* feature of the statute of Elizabeth was never in force in this State for another reason. By that statute it was made lawful for the "Lord Chancellor, as *keeper* of the great seal, . . . to authorize four or more persons," in case of such general bequest, to devise and carry into execution a charitable scheme of the character indicated in the act. (2 Stats. at Large, 708.) That was a prerogative power, exercised by the keeper of the great seal as the representative of the king, and not by him

sitting merely as Chancellor. But the courts of this State, as held in the above cases, have no such prerogative jurisdiction, but "only a strictly judicial power." But in so far as that statute was merely confirmatory of such powers exercised by the Chancellor as were strictly judicial, it became, by judicial construction, interwoven in, and a part of, the common law of England, and to that extent is in force here. (*Vidal v. Girard's Ex'rs*, *supra*; *Howard v. Am. P. Soc.*, 49 Me. 288; *Shields v. Jolly*, 1 Rich. Eq. 99; s. o., 42 Am. Dec. 349; *Derby v. Derby*, 4 R. I. 436; *Ex'rs of Burr v. Smith*, 7 Vt. 241; *McAllister v. McAllister's Heirs*, 46 Vt. 272; *Fontain v. Ravenel*, 17 How. 385 *et seq.*; *Ould v. Washington Hospital*, 95 U. S. 303; *Going v. Emery*, 16 Pick. 107; s. o., 26 Am. Dec. 645; *State v. Griffith*, 2 Del. Ch. 392; *Miller v. Chittenden*, 2 Iowa, 369 *et seq.*; *Williams v. Williams*, 8 N. Y. 525; *Treat's Appeal*, 30 Conn. 113; *Williams v. Pearson*, 38 Ala. 299.)

Before that power can be exercised, however, the scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. (2 Redf. on Wills, 409, subd. 2-4; *Id.* 505, subd. 16.) The mere direction to expend money "for charitable purposes" *at large* is too indefinite and uncertain to be so carried into execution, under the rulings of this court in the cases cited, and hence that alternative must be held to be void for uncertainty. (To the same effect, *Bridges v. Pleasants*, 4 Ired. Eq. 26; s. o., 44 Am. Dec. 94; *Nichols v. Allen*, 130 Mass. 211; *Prichard v. Thompson*, 95 N. Y. 76; *Fairfield v. Lawson*, 50 Conn. 501; s. c., 47 Am. Rep. 669; *Fontain v. Ravenel*, 17 How. 385 *et seq.*)

6. Is the second alternative mentioned in the seventh paragraph of the will, to wit, "to be . . . given to any of my heirs who are in need, or not in very comfortable circumstances, as to my executors seems fit and proper," sufficiently definite and certain to be carried into execution?

Ordinarily, a gift to the testator's heirs would, of course, be to those who would take under the statutes. (*Edge v. Salisbury*, Amb. 70; *Isaac v. Defriez*, Amb. 595; *Widmore v. Woodroffe*, Amb. 636; *Smith v. Harrington*, 4 Allen, 566.) But the words "my heirs" must be construed with reference to the context. Manifestly, the testator did not mean those who would have taken his property under the statutes had he made no will, for the two grandsons would then be included. But the clause in question is not to go into effect at all until the death of both of such grandsons without either of them leaving issue—that is to say, not until the death of his sole heirs at law. Besides, such alternative gift is not simply to heirs, or heirs generally, but "to any . . . who are in need, or not in very comfortable circumstances, as to my executors seems fit and proper." This manifestly means those who, upon the death of both of his grandsons without issue, would be his other blood relations, and who might, under the other circumstances named, have become his heirs. It does not include all relatives, however remote. (*Edge v. Salisbury*, *supra*; *Brunsdon v. Woolredge*, Amb. 507; *Isaac v. Defriez*, *supra*; *Widmore v. Woodroffe*, *supra*; *Smith v. Harrington*, *supra*.) It only includes such of his blood relations as should then be in need, or not in very comfortable circumstances, and would take by descent under such other circumstances. Upon such relatives as should come within such description the executors were directed to bestow the bequest therein referred to, as to them might seem fit and proper. The limitation to such needy relatives, and those not in very comfortable circumstances, makes the bequest charitable in its purpose. (*Edge v. Salisbury*, *supra*; *Brunsdon v. Woolredge*, *supra*; *Isaac v. Defriez*, *supra*; *Widmore v. Woodroffe*, *supra*; *Mahon v. Savage*, 1 Schoales & L. 111; *Attorney-General v. Duke of Northumberland*, L. R. 7 Ch. Div. 745; *Heaketh v. Murphy*, *supra*; *State v. Griffith*, *supra*; *Attorney-General v. Price*, 17 Ves. Jr. 371.) It is moreover sufficiently definite and certain to be carried into execution. (*Ibid.*; *Beardsley v. Selectmen* [Conn.], 3 Atl. Rep. 557; *Quinn v. Shields*, 62 Iowa, 129; *Sowers v. Cyrenius*, 39 Ohio St. 29;

De Camp v. Dobbins, 20 N. J. Eq. 36; Gray's Rule against Perpetuities, §§ 683-685.) Especially is this so where, as here, the bequest is charitable in its object, and to trustees for the benefit of a class with limited discretionary powers of selection. (*State v. Griffith, supra*; *Ex parte Lindley, supra*; *Nash v. Morley*, 5 Beav. 177; *Treat's Appeal*, 30 Conn. 113; *Birchard v. Scott*, 39 Conn. 63; *Beardsley v. Selectmen, supra*; *Hesketh v. Murphy, supra*; *Miller v. Atkinson*, 63 N. C. 537; *McAllister v. McAllister's Heirs*, 46 Vt. 272; *Shotwell v. Mott, supra*; *Power v. Cassidy*, 79 N. Y. 602; *Saltonstall v. Sanders*, 11 Allen, 446; *Shields v. Jolly, supra*; *Goodale v. Mooney*, 60 N. H. 528; s. o., 49 Am. Rep. 384; *Derby v. Derby*, 4 R. I. 414; *Ould v. Washington Hospital*, 95 U. S. 303; 2 Perry on Trusts, § 732.)

7. But it is claimed that where a gift is for two or more alternative uses, one of which is void for any reason, the whole gift fails. We do not think the authorities cited in support of the proposition sustain it. In *Morice v. Bishop of Durham* (9 Ves. Jr. 399; s. o., 10 Ves. Jr. 521), it was simply held that a bequest in trust for such objects of *benevolence* and *liberality* as the trustee in his own discretion should most approve, could not be supported as a *charitable* legacy, and was therefore held in trust for the next of kin. There was no alternative bequest. It failed because it was not a charitable bequest. Here it is a charitable bequest, and for the next of kin. In *Thomson v. Shakespear* (1 De Gex, F. & J. 399), the gift was to be laid out "in forming a museum at Shakespear's house in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes." There was no alternative presented. It was held, in effect, that the bequest for the museum could not be sustained as a gift "for the benefit of private persons," and that the last clause, though general and discretionary, was so connected with the museum as to indicate the same general purpose, and hence could not be sustained as a charity. *Nichols v. Allen* (130 Mass. 211) is to the same import. In *Kendall v. Granger* (5 Beav. 300) there was a bequest of personalty to be "applied for the relief

of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," and the bequest was held void because the last alternative was not necessarily charitable. To the same effect was *Norris v. Thomson's Ex'rs*, 19 N. J. Eq. 307. The same principles are sanctioned in 2 Perry on Trusts, § 711, and cases there cited. Here both alternatives are charitable in their objects, and hence sustainable as such, and therefore the case is distinguishable from those cited in which one of the alternatives was not charitable.

8. By the fifteenth paragraph of the will the testator, in effect, willed and directed that in case his estate exceeded the legacies therein mentioned, then the surplus or remainder of his estate should be appropriated and used by his executors in aid or encouragement of charitable purposes; and if, in their judgment, there should be sufficient amount of said surplus, then he recommended that the same should be used to establish a school in Omro, or some place in Winnebago county, "for the education of young persons in the domestic and useful arts." We have already seen that a bequest for "charitable purposes," standing alone, is too vague and indefinite to be carried into execution. This, as we have noticed, is upon the theory that courts are confined to the exercise of judicial powers, and hence have no authority to devise a particular scheme or plan of charity. But here the general words are followed by others indicating a particular scheme or plan for the expenditure. What effect is that fact to have upon the validity of the bequest? In *Thomson v. Shakespear* (*supra*), the general words which might otherwise have been construed to be charitable were restricted, by the words which preceded them, to the Shakespear premises. "It is a universal rule of construction, founded in the clearest reason," said Black, C. J., "that general words in any instrument or statute are strengthened by exceptions and weakened by enumeration." (*Sharpless v. Mayor*, 21 Pa. St. 161.) That rule has been applied by this court. (*Wis. Cent. R. Co. v. Taylor Co.*, 52 Wis. 90, 91.) Thus, according to Lord Bacon, "all words, whether they be in deeds or statutes, or otherwise, if they be general, and not

express and precise, shall be restrained unto the fitness of the matter and the person." (Broom's Leg. Max. 646. See, also, *Thorpe v. Thorpe*, 1 Ld. Raym. 235; *Moore v. Magrath*, Cowp. 9; *Roe v. Vernon*, 5 East, 51; *Morrell v. Fisher*, 4 Exch. 591; *Wood v. Rowcliffe*, 6 Exch. 407.)

The same rule was recently applied to the description in a bill of sale in Minnesota. (*McAlpine v. Foley*, 25 N. W. Rep. 452.) "Thus the word 'benevolent,' intrinsically considered, includes more than legal charities, but its signification may be narrowed by the context" so as only to include charities. (*De Camp v. Dobbins*, 31 N. J. Eq. 671.) So, it has been held in this State that where a power of attorney is given for a particular purpose, general words therein are not to be construed at large, but merely as giving general powers for carrying into effect the special purpose for which the power was given. (*Roundtree v. Denson*, 59 Wis. 522.) It is now universally admitted that in construing a will the rule is to read it in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the testator, to be extracted from the whole instrument, should follow from so reading it. "Then the sense may be modified, extended, or abridged, so as to avoid those consequences, but no further." (*Abbott v. Middleton*, 7 H. L. Cas. 115, and cases there cited.) "Quite consistently with this rule, words and limitations may be supplied or rejected, when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument." (*Ibid.*; *Thellusson v. Rendlesham*, 7 H. L. Cas. 494; *In re Northern Estate* [*Salt v. Pym*], L. R. 28 Ch. Div. 157; *Scott v. West*, 63 Wis. 551, 552.)

Applying the foregoing principles to the paragraph of the will here in question, and assuming, for the present, that the establishment of a school of the character there indicated is a charitable purpose, then, as it seems to us, we are authorized to hold that the particular charitable purpose which the testator directed his executors to use such residue of his estate in

aiding and encouraging, was in the establishment of such school. After expressing his "charitable purposes" generally, he recommends a scheme for its exercise in the establishment of the school, in case the amount of such surplus is sufficient for that purpose in the judgment of his executors. No other scheme is suggested, and, as we have seen, the court is powerless to devise one. It follows that the intention of the testator, as expressed in that paragraph of the will, is to be wholly defeated, unless we construe the word "recommend" to mean something more than is ordinarily implied by it; and, in view of the context, and the authorities cited, we think we may give it the meaning of command or direction to use such surplus to establish the school in the event indicated. (*Knœ v. Knœ*, 59 Wis. 172.)

The language of the will seems to contemplate a school of the character indicated, to be incorporated. The mere fact that the corporation was not *in esse* on the death of the testator in no way frustrates the trust. To establish such a school is to give it a legal existence—that is to say, a corporate existence. (*In re Taylor Orphan Asylum*, 36 Wis. 534; *Dodge v. Williams*, 46 Wis. 100–102; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; Gray's Rule against Perpetuities, § 607, and cases there cited. It is to be established by the executors in their capacity as trustees. It could not be established by executors until there were executors, and there could be no executors until the death of the testator. They are to appropriate and use such surplus funds as may be in their hands for that purpose in the event indicated. The authorities cited fully sanction the legality of such appropriation and use of funds by trustees in the establishment of such a school. The same authorities hold that such a bequest is not void for remoteness, nor against the rule of perpetuities. (*Santa Clara F. Academy v. Sullivan* [Ill.], 6 N. E. Rep. 183.) The legal title to such estate is vested in the executors. (*Scott v. West*, 63 Wis. 555.) It will remain in them until they establish such school—that is, give it a legal corporate existence. It will then become vested in such corporation. Being thus contin-

nally vested, the doctrine of remoteness is inapplicable, upon the principles already suggested.

9. May the establishment of such a school be properly regarded as a charitable purpose? In *Kendall v. Granger* (*supra*), it was said by Lord Langdale, M. R., that a charitable, purpose "must be either one of those purposes denominated charitable in the statute of Elizabeth, or one of such purposes as the court construes to be charitable by analogy to those mentioned in that statute." Among the "purposes denominated charitable" in that statute were gifts for "relief of aged, impotent, and poor people;" and for "schools of learning, free schools, . . . scholars in universities; . . . education and preferment of orphans; . . . aid and help of young tradesmen, handicraftsmen," &c. (2 Stats. at Large, 708, ch. 4.) So, according to Mr. Perry, charitable trusts include all gifts in trust for educational purposes in their ever-varying diversity, as well as gifts for the relief and comfort of the poor, the sick, and the afflicted. (2 Perry on Trusts, §§ 687, 697.) In *Vidal v. Girard* (*supra*), it was held, in effect, that donations for the establishment of colleges, schools, and seminaries of learning, and especially such as were for the education of orphans and poor scholars, were charities, in the sense of the common law. Besides, it is to be a literary corporation, which, as well as charitable corporations, is excepted from the operation of the statute. (§ 2039, R. S.; *Santa Clara F. Academy v. Sullivan*, *supra*.) Unquestionably, the purpose of establishing "a school in Omro, or some place in Winnebago county, Wisconsin, for the education of young persons in the domestic and useful arts," was a charitable purpose, within the judicial sense. (*Treat's Appeal*, *supra*; *McAllister v. McAllister's Heirs*, *supra*; *Craig v. Secrist*, *supra*.) Especially is this so, since there is no restriction or limitation as to the class of young persons to be thus educated. In other words, it is to be a public school of the character indicated.

10. The scheme for using such surplus in the establishment of such school is, upon the principles already stated, sufficiently definite and certain to be carried into execution in the event named, and must therefore be regarded as valid. If

such residue should of itself be insufficient for the purpose of fully establishing such school, and such school can be established by the use of such residue and other funds contributed from other sources, under the charge and management of a proper corporation organized for the purpose, then we see no valid reason why such residue may not be so used in the establishment of such school. Of course, if such residue should, in the opinion of the executors, be insufficient of itself to establish such school, and sufficient funds from other sources are not secured, then such surplus would go to the persons entitled under the statutes.

11. Except the specific devises and bequests given to the wife, the will treats the entire estate as personal property. With such exceptions, and a note from *M. D. Morris*, each of the several gifts are to be paid in money. The direction to so pay in money gave to the executors, by necessary implication, the authority to convert all real estate not so specifically devised into money. (*Dodge v. Williams*, 46 Wis. 70; *Scott v. West*, *supra*; *Going v. Emery*, 16 Pick. 107; s. c., 26 Am. Dec. 645.) Such real estate, therefore, must be treated the same as though it were personal property, on the doctrine of equitable conversion. (*Ibid.*; *In re Gunn*, L. R. 9 Prob. Div. 242; *Baker v. Copenbarger*, 15 Ill. 103; s. c., 58 Am. Dec. 600; *Dodge v. Williams*, *supra*.)

12. Manifestly, it is the duty of the executors to administer the estate according to the provisions of the will, notwithstanding the duties thus imposed include such as are usually performed by trustees. (*Scott v. West*, 63 Wis. 555.) The amount of their bonds can be regulated by the trial court. Whether, in case of the death of one or more of the executors, the survivors or survivor could execute the provisions of the will, is left open for determination in case the question should arise.

The costs and disbursements of all parties in this court and the Circuit Court are payable out of the estate. The County Court will make such allowance to the respective parties out of the estate for counsel fees (including the service of E. R. Hicks) as, in the exercise of a sound discretion, may be just. Their services have furnished substantial aid in reaching, as

we trust, correct conclusions upon the several and intricate questions involved.

The judgment of the Circuit Court is affirmed on the appeal of Hiram W. Morris and M. D. Morris, and reversed on the appeal of Louisa M. Webster and others, and the cause is remanded for further proceedings according to law.

VERNOR *vs.* COVILLE.

[54 Michigan, 281.]

SALE OF REALTY UNDER A POWER.

A clause in a will which empowers the executors "to sell and convey any real estate," will authorize a conveyance by two executors, where the third has renounced his trust.

Such language in a will is presumed to have been made with reference to the statutory provisions relating to wills and conveyances by executors thereunder, and must be construed as if it embraced those provisions.

WRIT of error by the plaintiff to the Superior Court of Detroit.

Charles M. Swift, for appellant.

Alfred E. Hawes, for appellees.

SHERWOOD, J. Martha Rumney, on the 8th day of May, 1875, made her last will disposing of both real and personal estate. The will is as follows :

"*First.* I hereby give and bequeath to my only daughter, Mary E. Rumney, the interest and income of the sum of twenty-five hundred dollars, now loaned out on three bonds and mortgages made by James Dewey, Jacob A. T. Wendell and George W. Bryant, now in the hands of my attorney, Edward C. Walker, to be kept on interest in the best manner

for that purpose by my executors for and during so long a time as she shall remain unmarried ; the same to be divided equally between all my children whenever she shall marry.

Second. I desire that my executors shall pay all my just debts, but out of other property than the twenty-five hundred dollars aforesaid, which I desire shall be kept for her support and maintenance so long as she shall remain unmarried.

Third. All the rest and residue of my estate I hereby devise and bequeath to my children, John G. Rumney, Mason P. Rumney, Mary E. Rumney, Benjamin Rumney, and Henry R. Rumney, to them, their heirs and assigns forever, to be divided equally between them, share and share alike. In case any of them should die, leaving issue, the issue to take the share that would have fallen to the parent by representation.

Fourth. I will and direct that the share of my estate hereinabove bequeathed and devised to my sons Benjamin Rumney and Henry R. Rumney, shall remain in the hands of my executors until they reach respectively the age of twenty-five years, receiving meantime the income from the same ; leaving it, however, to the wisdom and discretion of my executors to deliver to them respectively their shares of said estate at any time after they reach the age of twenty-one, or any part thereof, if said executors are fully satisfied in either case that said share will be safely, wisely and judiciously used.

Fifth. I hereby nominate and appoint my son, John G. Rumney, and my friend, Guy F. Hinchman, the executors of this, my last will and testament, with full power and authority to sell and convey any real estate of which I shall die seized.

Sixth. Before the partition of my estate I direct my said executors to pay and refund to any and each one of my children any sum or sums they may have advanced for the support and expense of the family between the death of their father and my decease, less the proper value of their own board and maintenance during that period.

Seventh. It is my earnest desire that after my decease my

children shall continue to live together and shall constitute one family as heretofore.

Eighth. I direct that my said executors shall not be required to give bonds."

Mrs. Rumney died, and on the 25th day of April, 1875, her will above mentioned was admitted to probate in Wayne county. John G. Rumney duly qualified under his appointment as executor, and letters testamentary were issued to him. Guy F. Hinchman, the other executor named in the will, declined to qualify or act, and John G. Rumney has ever since acted as the sole executor of the will, carrying out its provisions to the best of his ability, and so far as the record discloses, to the entire satisfaction of all the heirs and legatees interested in the will or the estate.

The executor, John G. Rumney, on the 4th day of April, 1882, gave to the defendant John Webster an agreement to sell to him the homestead property belonging to the estate. All the heirs and executors were to sign the deed of conveyance. This contract was in writing, and is as follows :

"Whereas, John Webster, of Detroit, Michigan, is negotiating with John G. Rumney, as executor of the estate of Martha J. Rumney, for the purchase of the homestead property of said estate, in the city of Detroit, the same being No. 91 High street east, lot 60 feet front by 165 feet, more or less, deep, the terms agreed upon being as follows, viz.: Said Webster to assume the \$5,000 mortgage upon said property, and pay in cash enough with \$598 25, A. M. Coville & Co.'s note, to make up \$1,500, at time of delivery of perfect title paper and the balance of \$2,000, as follows: \$500 endorsed note at six months; second mortgage on said property for \$1,500, due on or before two years from date, with the privilege of paying said \$1,500, second mortgage, in \$500 payments at date interest accrues, viz., semi-annually; said \$500 endorsed note to be bankable; trade to be consummated within a reasonable time; all the heirs and executors to be grantors. To secure the fulfillment of this agreement, said Webster has delivered said Coville & Co.'s note, and said John G.

Rumney \$250 in cash, to Benjamin Vernor, of Detroit, Michigan.

The parties mutually bind themselves to the fulfillment of the above agreement.

JOHN WEBSTER.

JNO. G. RUMNEY,

Executor Estate of Martha G. Rumney.

In presence of

A. E. HAWES.

Detroit, April 4, 1882."

The executor deposited with the plaintiff the \$250, and John Webster deposited the note with the plaintiff, mentioned in and required by the contract, and as this court has heretofore held, for security for the performance of the same. (See 51 Mich. 186.) Before the sale of the homestead was perfected by giving a deed of the property the note deposited became due, and after the executor had tendered a conveyance to Webster, made and executed by all the heirs, in accordance with the contract, and the same had been refused by him, Rumney then claimed he was entitled to the note deposited, and gave the plaintiff a bond of indemnity, took the note and brought suit thereon against both makers and indorser.

Substantially the same matters were set up in defense as are now pleaded in this case. A recovery was had thereon in the Superior Court of Detroit, and on appeal to this court that judgment was reversed—the court holding that the present plaintiff, and not the executor, was the proper person to bring suit. That suit was then discontinued, and the note retransferred to the plaintiff, and this suit brought thereon against the makers and indorser.

The declaration is in assumpsit on all the common counts. The defendant pleaded the general issue with notice of several defenses, all indicating the intention of defendant to show on the trial of the case a want of title in the plaintiff and of any right to bring the suit, and that Webster's indorsement of the note was without consideration and invalid.

It is claimed by counsel for the defendants that the power was not conferred upon John Rumney alone, under the will, to make the sale of the homestead property in the contract heretofore given, contemplated, and that his letters of administration gave him no additional power for that purpose; that the power attempted to be used could only be exercised by both persons named in the will as executors, and that no sale of real estate could be made by Rumney alone, except as authorized by the judge of probate; and that the contract which was the consideration of Webster's indorsement and which gave the plaintiff his right to the custody of the note was, therefore, void, and the plaintiff could not recover. This point raises the only question we deem it necessary to consider, and adopting the counsel's premises, the conclusion to which he arrives necessarily follows.

The question raised is one of much importance to the people of our State. When the case was before this court before, this question was not finally determined, the proper party plaintiff not then being before the court. The solution of the question depends upon the proper construction of the will and the statutes relating to the subject. The language of the will under which the executor claims to derive his authority is plain and explicit, and it must be construed the same as though the provisions of the statute relating thereto and applicable were written in the instrument, as they necessarily constitute a part thereof, and it must be regarded as having been made with reference thereto.

The power of the executor to make sale of the real estate, and the contract for the sale thereof, which we are now considering, is given by the will if at all, and is not derived from any authority conferred by the judge of probate.

It is very clear, from the terms of the will, that Mrs. Rumney had great confidence in the persons named as her executors, as they were charged with important discretionary duties, and the exercise of much discrimination and judgment in the disposition, management and control of the property designed for the children, of the most difficult and delicate character. And, in such a case, nothing but imperative duty can

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ever excuse a court in disturbing or interfering with the action taken by the executors.

No question is or can be made about the power of both persons named as executors to do the act in question had both consented to serve and qualified. Hinchman renounced the trust and refused to qualify. His relation to the will and the trust was thereby rendered the same as though he had died. Could the remaining executor execute the powers and trust created under the will when there was no express provision authorizing one of the executors so to do, in case of the death of the other or his failure to qualify? There is no question but that one under such circumstances may exercise the powers and discharge the duties conferred upon both, in the management and disposition of the personal estate, and bind all persons interested therein. (Dyer, 23; 11 Viners' Abr. 271; Bac. Abr. D. 1; 2 Williams' Exrs. 810; *Jacomb v. Harwood*, 2 Ves. Sr. 267; *Wheeler v. Wheeler*, 9 Cow. 34; *Bogert v. Hertell*, 4 Hill, 492, 503; *Weir v. Mosher*, 19 Wis. 311; *Herald v. Harper*, 8 Blackf. 170; *Dominick v. Michael*, 4 Sandf. 406; *Boughton v. Flint*, 13 Hun, 206.) Co-executors and co-administrators are regarded, in law, as but one person, and acts done by one are deemed the acts of all in all matters relating to the personal estate. One may execute a valid release of a debt. (*Murray v. Blatchford*, 1 Wend. 583.) He may discharge a mortgage. (*People v. Keyser*, 28 N. Y. 226.) May make an assignment of a mortgage. (*Cronin v. Hazeltine*, 3 Allen, 324.) And this court has held that a deed made by one of two or more administrators was not void and not subject to attack in collateral proceedings. (*Osman v. Traphagen*, 23 Mich. 80.)

It is claimed by plaintiff's counsel that the following provision of our statute, if the power did not exist at common law, gives full authority to the one executor in this case to make valid sale of the real estate of the deceased, and authorized him to make the contract in question. The statute reads as follows:

"When all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act

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as such, such as are authorized shall have the same authority to perform every act, and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose, as if all were authorized, and should act together; and administrators with the will annexed shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose." (How. Stat. § 5844.)

I think this provision clearly authorizes the executor in this case to sell the real estate of the deceased mentioned in the will, and to make the contract for the sale thereof, to secure the performance of which the deposit of the note in question and its indorsement were made. Not only is the sale authorized, but the designation of the person and his power to make it are derived solely from the will. The probate of the will and letters testamentary furnish no more than the evidence of the existence of these things, and not the authority for doing them.

I think it may well be doubted whether the provisions of our statute, or that of 21 Hen. VIII, c. 4, so far as it relates to executors, is anything more than confirmatory of the common law upon this subject. (*Bonafant v. Greenfield*, 1 Cro. 80; Co. Litt. 113a.)

Whether this be so or not, it is quite certain that the spirit of the law requires that the intention of the testator, as expressed in his will, should be carried out. This could be as well accomplished usually by one person as by more; and whatever number may be selected, they are all supposed to be chosen with especial reference to their qualifications for the position, and to be prepared to act in accordance with the views and desires of the testator concerning the execution of the trust; and, however large the number may be, each is vested with all the powers of the others, and all are required to perform the same duty or duties, and in the discharge of them they act as an individual. But life and ability to act are always uncertain. That the testator may always have some person of his own choosing to execute his will in case of

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the death or inability of the other to act, is undoubtedly the principal object of appointing two or more executors, and to hold that the inability of one thus appointed to act, or his neglect to qualify, disqualifies the others, it seems to me would manifestly be against the intention of the testator and the true spirit of his will, and defeat the very object he had in view in making the appointment. To remove all doubt upon the subject, and secure the construction here contended for, seems to have been the object of the statute upon the subject both in England and this country.

It would, in my judgment, be a perversion of the true intention and meaning of the statute, and do violence to what I believe to have been for a long time the accepted interpretation of the law by the profession generally in our State, to hold otherwise. It is possible, and I think quite probable, that were we to give the statute the construction claimed for it by counsel for the defendant, titles to large amounts of real estate, purchased in entire good faith, and now quietly enjoyed, might become unsettled, and all the evil consequences usually accompanying such action by the courts would follow.

It seems to me there is no sufficient reason for, nor does public policy require such a construction of the law, and it ought not to be given by this court. The following authorities may be examined with profit in examining the question raised in this case: *Bonifaut v. Greenfield*, 1 Cro. 80; *Dike v. Ricks*, 4 Cro. C. 335; 1 Sugd. Pow. (6th Lond. ed.) 143, 144; *Pitt v. Pelham*, Ch. Cas. 178; 1 Lev. 304; *Wardwell v. McDonnell*, 31 Ill. 364; *Clinefelter v. Ayers*, 16 Ill. 332; s. c. 20 Ill. 463; *Conklin v. Egerton*, 21 Wend. 430; *Roseboom v. Mosher*, 2 Denio, 61; *Wills v. Cowper*, 2 Ham. 124; *Powell*, Devises, 196, 197; *Judson v. Gibbons*, 5 Wend. 224.

I think the executor in this case had the power to make sale of the homestead property of the Rumney estate, and the contract made therefor, and that the indorsement and transfer of the note in question were not without consideration, and must be held valid.

It is unnecessary to consider the case further. This dispo-

sition of the main question raised, renders it necessary to reverse the judgment, and a new trial must be granted.

CAMPBELL and CHAMPLIN, JJ., concurred.

COOLEY, C. J. The question in this case arises under the statute which provides that "when all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized, and should act together; and administrators with the will annexed, shall have the same authority to perform every act, and discharge every trust, as the executors named in the will would have had, and their acts shall be as valid and effectual for every purpose." (How. Stat. § 5844.) Another statute provides that "when a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors." (Id. § 5628.)

In this case two executors were named in the will, one of whom declined to qualify, but is still living. The other qualified and acted. The question discussed in the case was whether it was competent for him alone to execute, not for purposes of administration and long after the time for the settlement of the estate under the statute had expired, a power which by the will was conferred upon both. It is an interesting and important question, and was ably argued, but is not discussed in the opinion by Mr. Justice Sherwood, which treats the case as if the power had been executed as a step in administration. No one has ever doubted, so far as I know, that for administration purposes the acting executor might execute such a power, and no authority beyond the statute itself is needed in support of such an execution. Whether a case like the present is within the intent of the statute first recited, is quite a different question, which I do not discuss, because the prevailing opinion in the case avoids any mention of it.

TAPPAN'S APPEAL.

[52 Connecticut, 412.]

BEQUEST TO CHARITABLE USES.

A bequest, the object of which is "the establishment of a permanent fund for the charitable assistance and benefit of indigent, unmarried protestant females over the age of eighteen, residents of B.," which the testator directs to be transferred to the "Protestant Widows' Society of B., to be forever held and managed," etc., and, if this can not lawfully be done, then, that the trustees shall obtain an act of incorporation for a charitable institution under the name of the "Burroughs Home," to which the property shall be transferred, is in all respects legal, and may be carried out.

APPEAL from a decree of the Probate Court. The case is sufficiently stated in the opinion.

S. E. Baldwin and *O. P. Backus*, for appellant.

C. Thompson and *M. W. Seymour*, for appellees.

PARK, C. J. The questions controverted in this case grow out of the twelfth and residuary clauses of the will of Catharine A. Pettengill, late of the city of Bridgeport, deceased. The residuary clause is as follows:

"After paying and satisfying all of the above provisions of this my last will and testament, out of my estate, all of which is charged therewith, and my executors are hereby fully empowered to sell and convey any real estate or personal estate not specifically devised for the purpose of paying any of the above legacies, if necessary so to do, which shall be determined by the judge of probate, then all the rest and residue of my estate, real and personal, of every nature and description, and all that shall belong to my estate and be undisposed of by reason of the lapsing or failure to take effect of any of said legacies or devises for any cause whatsoever (for I intend hereby that no part of my estate shall become intestate estate), I give, bequeath and devise to the persons respectively who shall for the time being be the rector of the Society of St. John's

Parish aforesaid, the pastor of the First Congregational Church in said Bridgeport, and the mayor of the said city of Bridgeport, and their successors in office, and to Nathaniel Wheeler, Edward Sterling, Samuel W. Baldwin and John Hurd, all of said Bridgeport, to have and to hold the same in trust for the following purposes, and subject to the following directions, to wit:—

“1. The object sought by this gift is the establishment of a permanent fund of real and personal estate, which shall be used for the charitable assistance and benefit of indigent unmarried Protestant females over the age of eighteen years, residents of said city of Bridgeport; and it is my wish that this fund shall be held and managed by the managers or directors of the Bridgeport Protestant Widows' Society of said Bridgeport, and their successors in office forever, as they, from their knowledge and experience in a similar department of humane work, would probably be better acquainted with the class of women this fund is intended to help and benefit; and, if the same can be made practicable and legal, then I authorize and empower my said trustees, on such terms as they may fix upon, to transfer and convey the property embraced in said fund to said managers and their successors in office forever, to be held by them forever for the charitable uses and purposes indicated above and subject to the directions hereinafter given.

“2. If for any reason the above wish and power cannot be legally carried into effect, then I direct and empower said trustees to obtain from the proper authorities in this State an act of incorporation for a charitable institution to be located in said Bridgeport, under the name of the ‘Burroughs Home,’ the object of which shall be to help and assist indigent unmarried Protestant females, over eighteen years of age, residing in said city of Bridgeport; and upon the legal organization of such incorporation, I direct and empower said trustees to transfer and convey to the said ‘Burroughs Home’ said fund of real and personal estate, to be held by them and their successors forever for the charitable uses and pur-

poses indicated above, and subject to the directions hereinafter given.

"3. If neither of the above provisions can legally be carried into effect, I then direct said trustees and their successors forever, to hold said fund of real and personal estate for the charitable uses and purposes indicated above, and subject to the direction hereinafter given; and if so held the same shall be known as the 'Burroughs Fund,' and the said rector, pastor and mayor shall, *ex officio*, be members of the board of trustees, and if any vacancy occur in the other members of the board, such vacancies shall be filled by the appointment of the Court of Probate; and I direct that no bond be required of such trustees by the Court of Probate.

"4. I direct that the old homestead of my father, now owned by me on John street, shall be used for the home of such females, if it be practicable; but if it should not be best, then some other portion of my land or real estate belonging to such fund may be used to establish a home thereon; but the value thereof shall not exceed, for both land and buildings, one-quarter of the value of such fund, and the remaining three-quarters or more of said fund shall be kept securely invested; but if deemed best to accomplish the humane purposes of this gift not to have land and buildings of one-quarter of the value of the fund as aforesaid invested in a home for such females, then all of said fund can be securely invested; and I further direct that full power of sale, conveyance, exchange and reinvestment be had and exercised as circumstances may require, and the execution of all necessary instruments.

"5. I direct that the income shall be applied annually, or at other times during the year, in such manner as may be thought best to accomplish the greatest good to the class I have hereby undertaken to help and benefit.

"6. I direct that the term 'unmarried' shall not exclude widows, divorced women, nor any woman who in fact has no husband, from the benefit of these provisions, providing she otherwise comes within said class.

"7. It may be better to organize and establish a corpo-

ration under the general laws of this State to carry out the charitable uses and purposes of this trust; and if so, in the judgment of said board of trustees, I direct them so to do; but I am very solicitous that this gift shall not fail to be carried into effect; and I ask said trustees to act wisely in this matter."

The testatrix declares that the object sought to be accomplished by this gift is the establishment of a permanent fund, "which shall be used for the charitable assistance and benefit of indigent unmarried Protestant females over the age of eighteen years, residents of the city of Bridgeport."

It is said by the appellant that the word "benefit," as used in the phrase "charitable assistance and benefit," in this bequest, does not confine the trustees to charitable benefits in the administration of the trust, but leaves them at liberty to assist the objects of the testatrix's bounty in any manner beneficial to them, although the benefit may not be charitable, as that word has been legally construed in our statute of charitable uses. But we think the word "charitable" qualifies the word "benefit" as well as the word assistance," and that the phrase has the same meaning as if it read "charitable assistance and charitable benefit." The words "assistance and benefit" are used in it as synonymous. They are applied to an indigent class of unmarried females, and it is impossible to see how they could be assisted by a bequest without being benefited, or benefited without being assisted. It is conceded that the word "charitable" qualifies one of the words; it must therefore qualify the other, which has the same meaning. We think, therefore, that this bequest creates a public charity, and nothing more.

The testatrix suggests four different modes for the administration and dispensation of this public charity, and declares her preference for the first mode named, "if the same can be made practicable and legal" for the purpose; but if, "for any reason," the first named mode cannot be legally carried into effect, then she declares her preference for the second mode suggested; and in like manner for the third and fourth modes in their order.

The appellant is therefore in error when she claims that the trustees have the discretionary power to select either of the modes prescribed for the administration of the trust. They have no discretion in the matter. They must take the first, if that mode shall be found to be practicable and legal; but if not, then they must resort to the second, and that must be the mode if legal for the purpose. And so with the third and fourth modes stated.

In regard to the first mode, that the managers or directors of the Bridgeport Protestant Widows' Society of Bridgeport shall hold and manage the fund, we think the object of the testatrix cannot be carried out by it, because the corporation is not authorized by its charter to receive and administer charitable donations of this description as a trustee; and we must, therefore, consider the second mode prescribed by the testatrix. This mode, for the administration of the public charity, is like that provided by the testator in the case of *Coit v. Comstock* (51 Conn. 352). In all essential particulars they are the same. There, as here, the trustees were invested with the property till an act of incorporation could be procured from the legislature, and then they were required to transfer it to the corporation. There, as here, it was made the duty of the trustees to apply for the act as soon as it could reasonably be done, and only a reasonable time for procuring it was contemplated by the testator.

It is said by the appellant that in that case the testator expressly provided that the act of incorporation should confer all the powers necessary and proper to carry into full effect the purposes and objects of the bequest; but that in the present case the will is silent on the subject. But we think it is clearly implied. The testatrix fully states the object she wishes to accomplish by the bequest. The accomplishment of the object she commits to a corporation to be chartered by the legislature. Surely she intended that the corporation should possess all the powers necessary and proper for the accomplishment of the object. This is too manifest for controversy.

We think the charitable bequest made in the residuary

clause of this will comes within the principles established by this court in the case referred to, and the considerations applied to the will in that case apply with equal force to the residuary clause in this. The same claims were made in that case against the legality of the bequest that are made in this, and they were all fully considered by the court, and decided adversely to the claimants.

It was said in that case that the description of the beneficiaries was not sufficiently definite to enable a Court of Chancery to carry the bequest into execution. The same claim is made here ; but it is manifest that the description of the class from which the beneficiaries are to be selected is as definite in this case as it was in that and in other cases there referred to. The term "Protestant," which appears in the description in this case, is the only word that requires consideration ; but it is obvious in what sense it was used by the testatrix. The term includes all those who believe in the Christian religion and do not acknowledge the supremacy of the pope.

We think the public charity established in the residuary clause of this will is valid.

Is the bequest contained in the twelfth article of the will valid ? The article is as follows :

"I give, bequeath and devise to the Society of St. John's Parish, an ecclesiastical society and body corporate, organized and existing under the laws of the State of Connecticut, and located near my residence in said Bridgeport, my said residence, comprising the land with the buildings thereon, bounded south on Fairfield avenue, east on land of said Society of St. John's Parish, north on land of said society, and west on land of Peter Norman, now or formerly ; and I give also to said society ten thousand dollars in cash, to their own use and benefit forever : but upon this express condition, that within three years after my decease the said society shall erect, or cause to be erected, on the grounds of said society, near its church edifice, a chapel, which shall cost not less than thirty thousand dollars, and which shall be named and known as 'The Burroughs Memorial Chapel' ; and on the failure or neglect so to do by said society, I give and devise the said real

and personal estate to my residuary legatees and devisees, to be theirs forever. In case there should be any good reason for extending said time beyond said three years, the judge of probate can extend the time by his order in writing, limiting, however, said Society to some definite time within which it shall erect said chapel."

The first question to be considered is, whether the condition attached to this gift is a condition precedent to the vesting of the property in the society, or a condition subsequent. If it is a condition subsequent, then the property vested in the society on the death of the testatrix, but the estate was liable to become extinguished unless the conditions should be complied with. We think the condition is a condition subsequent. The language of the testatrix indicates this. The grant is in the present tense—"I give," not "I will give when the society shall have erected a chapel," &c. The ten thousand dollars which she gives seems to have been given to assist the society to build the chapel if they should elect to do so. Jarman (on Wills, vol. 2, page 517), in summing up all the cases on the subject, says: "If the condition is capable of being performed instantaneously, it is a condition precedent; if time is required for the performance, it is a condition subsequent. If a definite time is appointed for the performance of the condition, but none for the vesting of the estate, it is a condition subsequent." Wigram (on Wills, page 272) says: "If the condition is at all capable of being construed as subsequent, it will be deemed to be such." Washburn, in his work on Real Property (vol. 1, pages 468 and 472), quotes approvingly the rule laid down by Webster in *Finley v. King* (3 Pet. 362), which was, that, "if the act may as well be done after as before the vesting of the estate, the condition is subsequent." (See also *Hayden v. Inhabitants of Stoughton*, 5 Pick. 528; *Merrill v. Emery*, 10 Pick. 507; *Tilden v. Tilden*, 13 Gray, 10; *Parker v. Parker*, 123 Mass. 584.) These authorities clearly make the condition in this case a condition subsequent to the vesting of the property in the society.

But it is said, that the power given to the Court of Probate to extend the time for the building of the chapel indefinitely,

ties up the property indefinitely in the hands of the society, thereby rendering the bequest obnoxious to our statute against perpetuities ; for until the chapel shall be built the property is not the absolute property of the society, and they have no right to appropriate it to the charitable purpose designated in the will.

But the appellant is in error in regard to the power given to the Court of Probate to extend the time for the building of the chapel. The language of the will is "in case there shall be any good reason for extending the time beyond the three years," &c. There must be a good reason shown before the Court of Probate can extend the time at all, and even then the court is limited to a reasonable time for the building of the chapel under the circumstances then existing. The will contemplates only a short period, of such time only as is reasonably necessary for the completion of the work. The judge of probate has no discretion in the premises other than what the will gives him, and if he errs on the subject his action is reviewable by a higher court.

But it is said that the tying up of the property in the hands of the society for the period of three years renders the conveyance obnoxious to the statute, and authorities are cited from the State of New York to that effect. But it should be remembered that the statute of New York is very different from our own on the subject of perpetuities. The statute there provides that "the absolute power of alienation shall not be suspended by any limitation or condition whatever longer than during the term of two lives in being ;" and it has there been held that the suspension, for a certain definite period, however short, violates the statute, for it may be longer than two lives in being. By our statute the suspension may be made during any number of lives in being when the will is made creating the suspension, and during such a period afterwards as will leave it impossible for the estate to be carried by the terms of the will to parties not in being when the will was made and not the immediate issue of parties then in being. A will must make it possible, by its terms, for parents to be born after it is

made, whose issue will take the estate, in order to render the will obnoxious to our statute; which manifestly would require a much longer period than three years. Our statute allows wills to be made conveying property to parties in being when the will is made, or to their immediate issue, born or unborn. Hence, to make them obnoxious to the statute, they must go one step further, and leave it possible for the issue of unborn issue to take the estate. The cases cited from New York, therefore, are not authority in regard to our statute.

We think the bequest to the society is not obnoxious to our statute of perpetuities.

We advise the Superior Court that the reasons of appeal are insufficient.

In this opinion the other judges concurred.

GIDDINGS vs. TURGEON.

[58 Vermont, 106.]

EVIDENCE.—A HUSBAND OF A LEGATEE AS WITNESS OF THE WILL.

A will, executed and presented for probate prior to the statute of 1884, was void when one of the three witnesses to it was the husband of one of the legatees. A statute, which changes the rules of evidence relating to the execution of wills, does not have a retrospective operation. A will must be proved as the law required at the time of its execution.

APPEAL from the Probate Court. Heard, September term, 1885, Veazey, J., presiding. The court ruled, *pro forma*, that Partridge, being the husband of one of the legatees, was not a competent witness to prove the execution of the will; and excluded his testimony, and rendered judgment that said instru-

ment was not the last will of Elmina Turgeon, and ordered the result certified, etc.

Lawrence & Meldon and W. W. Stickney, for plaintiffs.

M. H. Goddard, for defendant.

ROYCE, C. J. This was an appeal from the allowance of an instrument by the Probate Court as the last will of Elmina Turgeon; and the only question presented is, whether the instrument was so executed that it should be held to be the last will of the said Elmina.

It was executed as and for her last will on the 22d day of March, 1884; and by it she bequeathed a certain portion of her estate to Julia M. Partridge. One of the attesting witnesses to the execution of the instrument was H. E. Partridge, who was then and ever since has been the lawful husband of the said Julia M. The instrument was presented for probate on the 10th day of May, 1884, and on the 27th day of June, 1884, the Probate Court adjudged the legacy therein to Julia M. Partridge to be void, and otherwise established it as the last will of the said Elmina.

That court must have held that H. E. Partridge was a competent witness to prove the execution of the instrument; for, unless he was so competent, the instrument could not have been established as a will. The only question presented for our consideration is as to his competency.

The common law rules of evidence preclude husband and wife from being witnesses for or against each other in a suit where either are parties or are directly interested in the result. The rule is not based wholly upon the ground of pecuniary interest, but is a rule of policy, based on the necessity of protecting the confidence and domestic harmony which should exist between husband and wife, which, without the rule, might be invaded and disturbed. (See *Executor of Carpenter v. Moore*, 43 Vt. 392, and cases there cited.) And since the removal of incompetency by the statute of 1852 on account of interest, the court has uniformly held that the common law

rule resulting from the marital relation was in force the same as before the passage of that statute. (*Executor of Carpenter v. Moore, supra.*)

When the instrument in question was executed, the wife of H. E. Partridge was interested as a legatee in having it established as a will; and consequently he was not a competent witness to prove its execution, unless he was made competent by what transpired in the Probate Court in adjudging the legacy given to his wife void, and by virtue of section 2,046, R. L.

It will be seen by reference to that section that the only persons named in it who can be made competent that would otherwise have been incompetent are those to whom a beneficial devise, legacy, or interest of or concerning real or personal estate, is given by such will. That class of persons is made competent by treating the devise, legacy or interest, given to them, as void. H. E. Partridge did not come within that class. The legacy that was adjudged to be void was one made to his wife; he had no interest in it, except such as might result from his marital right. And the right of the wife to hold the legacy when received, as against any claim that the husband might make to it, is secured by sec. 2,322, R. L. The right to the legacy was the personal right of the wife and to be held by her to her sole and separate use, and the husband's marital right to reduce it to his possession would not attach to it. (*White v. Waite*, 47 Vt. 502.)

The evident purpose and intention of the statute was to remove the incompetency on account of interest from the class of persons named in it; and the class intended is clearly and precisely defined. H. E. Partridge had no present or prospective interest in the legacy given to his wife; so that he had no such interest as it was the purpose and intention of the statute to remove. His incompetency rests upon the rule of policy, before alluded to, which excludes the husband as a witness in a matter in which his wife has an interest; and that incompetency the statute has not attempted to remove. The court had no right to adjudge the legacy given to Mrs. Partridge void, for the reason that she did not come within the

class named in the statute. She had the same right to the legacy given to her that any other legatee would have; and the act of the court adjudging her legacy void did not affect her right to it, or the interest that she had to have the instrument established as a will. The court might as well adjudge a legacy given to any other person void, and thus remove the disqualification of some other legatee as an attesting witness, as to adjudge the legacy given to Mrs. Partridge void, and by so doing qualify her husband as a witness.

The statute relied upon defines with particularity the legacies that may be held void, and should not be construed to embrace those that are not included in it. If the legislature had intended to confer the power to declare a legacy given to the wife of an attesting witness void, and thus make the husband a competent witness, it is probable they would have employed some such language to express that intention as is used in the 16th sec. of 1 Victoria, c. 26, by which it is provided that such a legacy, as well as those that are specified in our statute, shall be utterly null and void.

The witness Partridge being incompetent to prove the execution of the will, at the time of its execution, has he been made competent by the virtue of Act No. 109, approved November 25th, 1884? That act provides that if a person attests the execution of a will, to whose wife or husband a legacy is given, such legacy shall be void, and the person so attesting shall be admitted as a witness, as if such legacy had not been given.

This suit was pending at the time of the passage of that act, and to give it the retrospective operation that is claimed by the proponents, would, in effect, be allowing them to establish the instrument as a valid will, which was invalid at the time of its execution, by the use of evidence which was incompetent to prove its execution at the time it was executed.

If Mrs. Turgeon died intestate, her heirs at law had a vested interest in all her estate that was subject to distribution; and the legislature had no right, by any change of the rules of evidence, to deprive them of that right and prevent

them from asserting it by depriving them of the right to insist that the instrument propounded as her will should be proved as the law required at the time of its execution. To give the act the operation claimed by the proponents would, as the record now stands, deprive those opposed to the establishment of the instrument as the will of Mrs. Turgeon of a vested right to make such opposition, and would be contrary to the rules given for the construction of statutes in the cases cited by the learned counsel.

The judgment is affirmed and ordered to be certified to the Probate Court.

VERMONT STATE BAPTIST CONVENTION *vs.* LADD.

[58 Vermont, 95.]

LEGACY.—INTEREST.—ACCORD AND SATISFACTION.

Legacies, unless otherwise controlled by the will, draw interest after one year from the probate of the will ; and the rule is not affected by the fact that the executor is unable to gather in the assets and pay the legacy within the year.

When there is a dispute between an executor and a legatee as to the amount of interest due on a legacy, on account of the expense and delay caused by a long litigation carried on for the protection of the estate, an acceptance by the legatee of a sum less than the one due on the legacy is an accord and satisfaction, if the payment is made upon the express condition that it shall be in full for the balance due, and the money accepted without protest against such condition.

APPEAL from the Probate Court. Heard on an agreed statement, September term, 1885, Veazey, J., presiding. Judgment *pro forma* for the plaintiff.

Priscilla B. Leach, the testatrix, died May 1, 1880 ; her will was probated July 19, 1880, and letters testamentary were issued to defendant Ladd on the 30th of the same month.

The following is the clause of the will relating to the plaintiff :

"3d. I give and bequeath to the Baptist State Convention, incorporated by the legislature of Vermont in the year 1851, eight thousand dollars (\$8,000), the principal to be invested and the income to be used to support the preaching of the gospel in feeble churches, and in destitute places, at the discretion of the convention, only designating (\$50) fifty dollars of said income to be paid annually to the Baptist Church in Middletown, Vt., for pastor or preaching."

Henry A. Harman, for defendant.

W. C. Dunton and *Edward Dana*, for plaintiff.

POWERS, J. Legacies in this State, unless otherwise controlled by the will, draw interest after one year from the probate of the will. (*Bradford Academy v. Grover*, 55 Vt. 462.)

And this rule is not affected by the circumstance that the executor is unable to gather in the assets and so provide himself with funds to pay the legacy within the year. (*Marsh v. Hague*, 1 Edw. Chan. 174.)

The important contention between the parties arises upon the payment made by the defendant of the sum of \$2,880 on September 3, 1884, which, he insists, amounted, under the circumstances, to an accord and satisfaction. The plaintiff claims that there remained due a large balance of interest upon its legacy, and that the sum of \$320 deducted by the defendant for legal expenses was wrongful and should be allowed plaintiff in this accounting.

Soon after the death of the testatrix a litigation sprang up which threatened, if successful, to defeat not only the residuary legacies, but largely to diminish the specific legacies under the will.

The executor thereupon made an agreement with two of the charitable legatees to share in the expense of that litigation, and wrote Mr. Davis, the plaintiff's treasurer, February 25,

1884, a letter, notifying him of the litigation, and informing him that "*pro rata* assessments, covering costs, will be made on all concerned." The result of the litigation was favorable to the estate, and the other two charitable societies paid their share of the legal expenses, and waived all claim for interest on their legacies pending the litigation.

August 16, 1884, the executor notified Mr. Davis that the litigation was ended, and enclosed a statement of the standing of the plaintiff's legacy, as claimed by the executor, which showed due the plaintiff \$2,880, after deducting assessment for legal expenses and allowing no interest pending litigation; and also sending blank draft for said sum, which Mr. Davis was requested to sign, which the executor promised to honor on presentation, and also a receipt in full, which he requested Mr. Davis to sign and return.

In response to this letter Mr. Davis wrote, August 19, 1884, saying: "I think the practice of Probate Courts in Vermont is to allow interest on legacies after one year from the time will is probated. I suppose there will have to be an accounting for interest. I will receipt to you any amount you may send me to account for on settlement."

August 20, 1884, the executor replied in a letter, rebuking the claim for interest and reminding Mr. Davis that two of the sisters of Mrs. Leach were entirely without means—one a confirmed invalid—and suggesting that the residue going to them ought not to be drawn upon to pay an interest charge.

No reply to this letter was made by Mr. Davis.

August 26, 1884, the executor again wrote Davis, saying: "Immediately upon the termination of litigation involving one-half the estate of Mrs. Leach, I deposited balance due your society, less *pro rata* assessment for defending suits, in bank here, requesting you to draw for the amount, viz., \$2,880," and adding, "the funds are not drawing interest."

On receiving this pointed and specific notification, Mr. Davis consulted legal counsel relative to the matter, and on September 3, 1884, wrote the executor as follows:

"CAVENDISH, VT., September 3, 1884.

"C. B. ORCUTT, Esq., Agt.,

"150 Broadway, N. Y.,

"DEAR SIR: I have this day drawn on you through Baxter National Bank, Rutland, for \$2,880.

"Yours truly,

GEO. F. DAVIS,

"Treasurer."

And on the same day he made the following draft:

"\$2,880. CAVENDISH, VT., September 3, 1884.

"At sight, after date, pay to the order of Geo. R. Bottum, cashier Baxter Nat. Bank, twenty-eight hundred and eighty dollars, value received, and charge to account of

"GEORGE F. DAVIS,

"Treas. Vt. Baptist State Con.

"To C. B. ORCUTT, Agent.

"JAMES S. LADD, Executor,

"Mrs. P. B. Leach's will, 150 Broadway, New York."

This draft was deposited by Davis in the Baxter National Bank for collection, and collected in due course and the proceeds placed to the credit of Mr. Davis.

September 4, 1884, the executor replied to the above letter of September 3, as follows:

"150 BROADWAY, N. Y., September 4, 1884.

"GEO F. DAVIS,

"Treasurer Vt. Baptist State Convention.

"DEAR SIR: Yours of the 3d inst. advising that you had drawn on me for \$2,880 duly received. I have paid the draft, which is in full for all claims against the estate of Priscilla B. Leach, being balance due on legacy to your convention, as per statement rendered August 16, 1884, and subsequent advice of August 26.

"Very truly,

C. B. ORCUTT,

"For J. S. Ladd, executor."

Mr. Davis held the money received from this draft some three weeks, and duly informed the directors of the convention

that he held it; and the convention has since retained it. The receipt of this money was duly reported to the convention at its next annual meeting by the treasurer, and his report was accepted without question in this behalf.

October 6, 1884, Mr. Davis wrote to the executor, saying in substance, he never had any authority to settle this matter for less than the amount legally due, and never intended to do so, and claiming the full amount of the legacy, with interest.

We are all agreed that this legacy was paid in full when Mr. Davis drew for the \$2,880, and applied the proceeds to the use of the plaintiff.

The correspondence above set out shows clearly an attempt by the executor to pay the \$2,880, in full extinguishment of the plaintiff's claim. It was offered as and for a full payment, and when accepted it was taken as offered in full. In this holding we do not question the general rule prevalent in this State and elsewhere, that payment of a sum less than the one due is no accord and satisfaction of the larger sum, because the facts do not bring the case within the range of that rule.

That rule applies only when the claim is liquidated, or is dependent upon a mere arithmetical computation. (*McDaniels v. Lapham*, 21 Vt. 222.)

Here it is true the claim, as the plaintiff now makes it, could be easily computed, and so, from its stand-point, was liquidated within the rule. But the defendant repudiated this claim, and did not pay in recognition of it. He made the payment upon the express condition that it should be in full for the balance due on the plaintiff's legacy. The plaintiff took the money and converted it to its own use, without even a protest against the defendant's condition that it was in full. It is now too late to repudiate that condition. If the plaintiff did not intend to accept the condition, it should have refused the money. It cannot accept the one and reject the other. A payment must be retained if accepted upon the terms annexed to it by the payer. *Solutio accipitur in modum solventis.*

In *McGlynn v. Billings* (16 Vt. 329), it was held, that when a debtor offers his creditor a certain sum as the balance due him on book, and upon his refusal by the creditor, deposits it with a third person for the creditor if he will accept it in full, and the creditor subsequently receives it from such third person, declaring at the time that he will not accept it in full, such acceptance of the money discharges the creditor's whole account.

In *Cole v. Champlain Transportation Co.* (26 Vt. 87), *McDaniels v. Lapham* (21 Vt. 222), and *McDaniels v. Bank of Rutland* (29 Vt. 230), the same doctrine was announced.

The defendant's letters of August 16th and 20th contained a clear notification to the plaintiff's treasurer of the terms upon which he could draw the \$2,880, which the defendant claimed was the balance due, and the treasurer accepted the money without even a protest, as in *McGlynn v. Billings*, that he repudiated the condition. He must have understood that the defendant was paying in full. This is sufficient to bring the case within the authorities cited.

But if there be any doubt on this point, the defendant's letter of September 4th, received while the money was in the treasurer's hands, renewed the condition upon which he was to hold it. He then was in condition to restore the money to the defendant, but after notifying his associates on the board of direction—and we must assume that he probably was less reticent in his dealings with them than he thus far had been with the defendant—he elects to retain the money, and the convention itself is now holding the funds.

It is not claimed in the brief of the plaintiff that Mr. Davis acted without proper authority in the matter of receiving this money. He was the fiscal agent of the convention, and the convention was fully informed of the claim of the executor respecting the amount of the balance due when the \$2,880 were paid. In the report of the managers to the convention, dated September 24, 1884, they say: "In regard to the Leach legacy a further payment of \$2,880 was made to the treasurer the 4th inst. The balance of \$320 is withheld by the executor of the will, on the claim that it is the part of costs necessarily incurred

in defending the estate, which the convention should pay. It should be noted that hereafter the Baptist church in Middletown is entitled annually to an order of fifty dollars from the income of this legacy."

This report was accepted and adopted by the convention.

The treasurer, at the same session of the convention, reported the Leach legacy at the sum of \$7,680, as part of the permanent fund of the convention, this being precisely the amount stated by the executor in his letter of August 16th, and this report of the treasurer covers the balance due, less interest and *pro rata* share of costs.

There can be, therefore, no room for doubt, that even if Mr. Davis had acted without due authority in accepting the payment of \$2,880, as the true balance due on this legacy, his principal has ratified the payment with full knowledge of the executor's claim.

The executor is not chargeable with interest on the legacy, nor with the \$320 withheld for legal expenses.

The judgment of the County Court is reversed, and judgment that all the claims made by the plaintiff in the agreed statement be disallowed, and ordered that this judgment be certified to the Probate Court.

SCHOFIELD vs. WALKER.

[58 Michigan, 96.]

CONTESTED PROBATE.—UNDUE INFLUENCE.

In a proceeding to probate a will, a legatee is not disqualified from testifying to matters which, if true, must have been equally within the knowledge of the testator. Section 7,545 has no application to such a case.

Where the probate of a will is contested upon the ground of undue influence exercised over the mind of the testatrix by her pastor and his wife, in whose family she was a boarder, and where the trial judge correctly and fully instructed the jury upon the subject of undue influence, it was not error to refuse

the following instruction: "If you find that a confidential relation existed between the parties, as the contestant claims, and that Mrs. Disbrow reposed her confidence in Mr. and Mrs. Schofield, and that they had such influence over her as is claimed, that influence must be kept free from selfish interest and cunning and overreaching bargains, and in their dealings with her no selfish advantage must have been taken of this influence. Such influence must be exercised in good faith, and not abused. It must be directed with reference to Mrs. Disbrow's best interest, and not to further their own selfish interests at her expense." The language was inapplicable to the case before the court.

Neither was it error, in view of the charge as given, for the court to refuse to give the following instruction: "If you find this confidential relation in fact existed, and the Schofields possessed the influence over Mrs. Disbrow as it is claimed they did, and that she reposed her trust and confidence in them as claimed, the situation would impose a solemn obligation upon the Schofields to abstain scrupulously from attempting to derive any pecuniary benefit to themselves which selfish motives might suggest at the sacrifice of those interests which they were bound to protect; for, if confidence is reposed in that matter, it creates a high and sacred trust, and an obligation and duty which must be observed. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If the means of personal control are given, they must always be restrained to purposes of good faith." The language is obscure when applied to the facts of the case. The rule of technical morality does not require that a person occupying confidential relations to a testator must do or say nothing to influence the action of the testator in his favor. If the influence exerted is not what in law is termed "undue influence," technical morality is not violated by its use.

Influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeal to the affections, cannot properly be termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do, against his will, what he is unable to refuse, is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another. (Syllabus by the court.)

APPEAL from probate. Error to Kent. The facts sufficiently appear in the opinion.

Blair, Kingsley & Kleinhaus, for appellant.

J. C. Fitz Gerald and Allen D. Adsit, for appellee.

CHAMPLIN, J. In this case the paper writing alleged to be

the last will and testament of Eliza H. Disbrow was propounded for probate in the Probate Court for the county of Kent, by the said Levi M. Schofield, proponent, in and by a petition filed in said court, upon the 15th day of July, 1884, which petition was in the usual form. The said contestant appeared, and filed her answer to said petition, thereby objecting, as one of the heirs at law and next of kin of said deceased, to the allowance and probate of said paper writing as the last will and testament of said Eliza H. Disbrow, deceased, for the reason that the said deceased, at the time of the making and execution thereof, was not of sound mind or testamentary capacity; that she was under restraint and undue influence at the time of the execution thereof, and was unduly influenced to make the same by the said proponent and his wife, Mrs. Levi M. Schofield, the legatees and devisees named in said instrument; and that the said instrument was not, in fact, the last will and testament of said deceased. And upon the hearing of said matter, the probate judge of said court having decided in favor of the validity of said will, an order was entered in said cause allowing the same, and admitting it to probate as the last will and testament of said Eliza H. Disbrow, deceased, from which order or decree of said Probate Court an appeal was taken by said contestant to the Circuit Court for the county of Kent. And said appeal having been duly perfected, an order was entered framing the issue in said cause as follows, to wit: "Whether the paper writing probated by the Probate Court of Kent county, as the last will of said deceased, is, in fact and law, the last will of said Eliza H. Disbrow, deceased." And the said cause having been brought to trial before a jury duly impanelled to try the same upon the issue thus framed, the said jury found the said issue in the affirmative, and judgment was thereupon rendered by said court in the usual forms, upon and in accordance, with the said verdict, declaring the said will to be the last will and testament of said Eliza H. Disbrow, deceased.

On the trial in the Circuit Court, Mrs. L. M. Schofield, who was named as a legatee in the will, was produced as a witness by the proponent, and asked the following questions:

“Question. Now, I will call your attention to this will. Before this will was made, did you have any conversation with her upon the subject of her making her will?”

Whereupon the attorneys for said contestant objected to said question, and to the witness answering the same, for the reason that said question was incompetent and inadmissible, for the reason that the said witness, Mrs. Schofield, was made incompetent and disqualified as a witness in her own behalf, being a person for whose benefit the suit or proceeding was prosecuted, and a party in interest, and therefore the statute (How. Stat. § 7,545), was a bar to the admission of her testimony on the point in question, and excluded her from answering the said question, and from testifying on the point, for the reason that the matter, if true, must have been equally within the knowledge of the deceased, Mrs. Disbrow, and not known to any other person; and that the said circuit judge overruled the said objection and allowed the said question to be put, and answered by said witness. And the said witness answered the said question as follows:

“Answer. Well, there was, in January. I suppose this would be what would come under that head. In January she was very much troubled. In the morning she came down, she would say, ‘I could not sleep; my mind is in such a condition, I cannot sleep.’ I wanted to know what was the matter. She said her affairs were not in a shape that she would want to leave them if she should drop off. I said: ‘Put them in a shape that you can relieve your mind. Don’t let such a thing as that keep you awake.’ For she would feel very badly when she didn’t get her sleep, and she said she wanted to talk to me about it. I said I had nothing to say on that question; that must be for herself; she must go to her lawyer and make her own will; I had nothing to do with that. She was then going down to Mr. Taggart’s every day for four or five days, and then she said: ‘I feel easier. I have got that thing settled.’”

This constitutes the first assignment of error. The ruling of the court was correct. The contestant had introduced testimony tending to prove that Mrs. Schofield had exerted an

undue influence over the testatrix in making her will, and she was introduced for the purpose of rebutting this evidence. She was not a party to the proceedings to establish the will. She may be interested, but such interest is remote and contingent. The debts must first be paid, and these may consume the whole estate. Under statutes or practice where interested persons are disqualified, she would be a competent witness. (*Freeman v. Spaulding*, 12 N. Y. 373; *Lawyer v. Smith*, 8 Mich. 411-424.) But our statutes have removed the disqualification of a witness on the ground of interest, and there appears to be no reason why she is not a competent witness.

The second assignment of error is substantially the same as the first, and must be overruled for the same reason.

The third and fourth assignments of error are based upon the refusal of the court to give the following instructions, namely:

Third. If you find that a confidential relation existed between the parties, as the contestant claims, and Mrs. Disbrow reposed her confidence in Mr. and Mrs. Schofield, and that they had such influence over her as is claimed, that influence must be kept free from selfish interest and cunning and overreaching bargains, and in their dealings with her no selfish advantage must have been taken of this influence. Such influence must be exercised in good faith, and not abused. It must be directed with reference to Mrs. Disbrow's best interests, and not to further their own selfish interests at her expense.

Fourth. If you find that this confidential relation in fact existed, and that the Schofields possessed the influence over Mrs. Disbrow that it is claimed they did, and that she reposed her trust and confidence in them as claimed, the situation would impose a solemn obligation upon the Schofields to abstain scrupulously from attempting to derive any pecuniary benefit to themselves which selfish motives might suggest, at the sacrifice of those interests which they were bound to protect; for if confidence is reposed in that manner, it creates a high and sacred trust and an obligation and duty which must

be observed. If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. If the means of personal control are given, they must always be restrained to purposes of good faith.

The confidential relation alluded to in the above requests refers to the evidence introduced by the contestant, tending to prove that the proponent of the will was, at the time of the death of Mrs. Disbrow, and had been for two years prior thereto, pastor of the Westminster Presbyterian church, of which Mrs. Disbrow was a member and constant attendant up to the time of her death, which was very sudden, and while she was walking upon the street; and Mrs. L. M. Schofield was the wife of her pastor. She resided in her pastor's family, and by her will made Mr. and Mrs. Schofield her sole legatees and devisees of all her property.

The contestant's counsel claim that these requests should have been given to the jury for a standard of conduct or morality that should govern the jury in their deliberations over the point whether Rev. Mr. Schofield and wife did what they ought not to have done in obtaining this will when confidential relations existed between them and the old lady. And they insist that when such relation exists, a different kind of conduct is required on the part of beneficiaries under a will, where they procure the testator to make the gifts to them, than would be required of strangers; that in such cases there is a "technical morality" which imposes a duty, where confidence is reposed, to faithfully act upon it and preserve it from any intermixture of imposition; and if influence is acquired it must be kept free from the taint of selfish interest and cunning and overreaching bargains. The question presented is whether the charge of the court sufficiently covered the point presented.

Upon an examination of the charge of the court we are satisfied that the court, in a clear and perspicuous charge to the jury, covered the whole law applicable to the case, and that his refusal to charge in the language of the request was

not error. He instructed the jury upon the law covered by the requests that

“ The contestant claims that she has put evidence in tending to prove that Mrs. Disbrow made this will in favor of her religious adviser and his wife, both of whom it is claimed were her confidential and trusted friends, to the exclusion of the contestant, her niece, and a natural object of the testatrix's bounty; and that Mr. and Mrs. Schofield had constant opportunities of exerting undue influence, and that the will is unreasonably and extravagantly in their favor. If you find from all the evidence in the case that such confidential relations in fact existed between the parties as claimed by the contestant, and that the opportunity for undue influence existed, as claimed, and if you find as a fact that the will presented was unreasonably and extravagantly in favor of Mr. and Mrs. Schofield, to the exclusion of the natural objects of Mrs. Disbrow's bounty—if you find all this as a fact, it will not be without considerable significance; for an inference may legitimately be drawn therefrom which would be unfavorable to the freedom of action which a will requires. If you find as a fact the existence of the confidential relations claimed by the contestant to exist in this case, and that the trust and confidence claimed was in fact reposed, their dealings, while they are to be closely scrutinized for the detection of any advantage being taken, yet if the influence they possessed was not, in fact, exerted, and did not in fact procure this will, then the will is her will, and should stand, notwithstanding the existence of the confidential relations and the confidence reposed; for the law does not, because of the existence of confidential relation or confidence reposed, however full the confidence or close the relation, incapacitate persons occupying such positions of trust from receiving the bounty of the testatrix; and does not impose upon them the duty of receiving such bounty, or of advising or persuading testatrix not to give it.”

The foregoing instructions were given at the request of the contestant's counsel, and he further instructed the jury, upon this branch of the case, upon his own motion, as follows:

"The proponent's theory of the case is that the deceased, Mrs. Disbrow, had suffered from ill treatment at the hands of her brother, her only relative living here, and the only near relative she had seen for many years; that Mr. Schofield, in the matter of her differences with her brother, befriended her, and advised her for what he conceived to be her good; that her life at Mrs. Ball's became so unpleasant that she felt she could not live there longer, and that she was received into the family of the Schofields as a boarder, partly because of her desolate condition, and was from thence considered and treated as one of the family; and that she, from her association with the Schofields, and because of her kindly treatment, conceived and entertained a strong affection for the members of the family, and that, induced by such affection and by the expectations of continuing to share the home of the Schofields during life, she freely, without compulsion or undue influence, made the will in question in their favor, and did not even inform them of the fact until after a lapse of considerable time from the date of its execution. Such is the theory of the proponents. If that theory is maintained, this is a valid will.

"The contestants, on the other hand, contend that the Schofields took advantage of the intimate and confidential relations established between them, and overpowered the will and mind of the testator, and induced her to make a will in their favor. And if you find the fact to be that they did so take advantage of the situation, and overpowered her will and mind, either one or both of them, so that in the making of this will she was not a free agent—if you find that undue influence was used, in other words, in inducing her to make this will, the will should not be sustained.

* * * * *

"It is not claimed in this case that there is any direct evidence of undue influence; but it is claimed by contestant that she has put evidence into the case which tends to prove indirectly, though not directly, that undue influence was used by the Schofields in procuring this will. And this claim is made from all the circumstances of the case.

"It is claimed, among other things, that Mr. Schofield was the religious adviser of the testator; that he and his wife were the confidential friends and advisers of the testatrix, I should say; that they had constant opportunities of exerting undue influence; and that the will is unreasonably in their favor; and that the natural object of the testatrix's bounty, the niece, was absent during this time, and is excluded by the terms of the will, as it appears. If you find that such confidential relations existed in fact, existed between the parties as claimed, and that an opportunity for undue influence existed as claimed, and if you find as a fact that the will presented was unreasonably and extravagantly in favor of Mr. and Mrs. Schofield, to the exclusion of the natural objects of Mrs. Disbrow's bounty, these circumstances will be of some significance, as an inference may be drawn unfavorably to the freedom of action which a will requires. But such inference must be drawn by you as an inference of fact, and you must be able to say that such an inference is justified upon the whole evidence.

"Naturally, in determining as to whether the will is unreasonably in favor of Mr. and Mrs. Schofield, you will consider the relations existing between the testatrix and her immediate and near relatives. Her want of affection for her brother may be considered; the fact, if you find it to be a fact, that she had assisted the niece, Mrs. Walker, in times past; the fact of her slight acquaintance with her; that she had not seen her in some fifteen years; together with the evidence tending to show that she entertained kindly feelings towards the Schofields, and expected to remain a member of their family.

"You will readily perceive, gentlemen, that an inference might be drawn from the fact of the exclusion from her bounty of near relatives, with whom the deceased had been on intimate and friendly terms, more strong than would be justified by the exclusion of one against whom the testatrix entertained no kindly feeling, or one who was a comparative stranger. So, in determining the weight to be attached to the circumstance that confidential relations existed, you will consider how far these relations induced trust and confidence

on the part of the testatrix; or, on the other hand, how far the testatrix was in her business affairs self-reliant. If such confidential relations existed, the law imposed upon the Schofields the duty of abstaining from attempting to derive benefit to themselves by taking advantage of the situation, and of the trust reposed; while if such confidential relations existed, and such trust and confidence was reposed, this is not sufficient to defeat the will, unless advantage was taken of the situation."

We think the charge of the court above given covers the law respecting the technical morality which Mr. and Mrs. Schofield were bound to observe under the facts of this case, as indicated by the bill of exceptions. This was not a case where it was claimed that an overreaching bargain had been made between persons occupying confidential relations, where in a court of equity was appealed to to set the same aside because of a selfish advantage having been taken by the person exerting an undue influence in his dealings with another. The language of the third request applies to a case of this kind, and was inapplicable to the facts before the court.

The language of the fourth request is obscure when applied to the case under consideration. It asserts the rule of law that where there is a trust relation existing, and a confidence reposed in consequence thereof, that situation imposes upon the party occupying such relation a solemn obligation to abstain scrupulously from attempting to derive any pecuniary benefit which selfish motives might suggest at the sacrifice of those interests which he is bound to protect. But what interests are here alluded to that the Schofields were under any obligation to protect? A person of sound mind, who is under no legal restriction, has the undoubted right to dispose of his estate by will to whomsoever he may choose. No kinsman has a vested right therein and no interests to be protected. The jury had already been instructed, at the request of the contestant, as above cited, that if the influence the Schofields possessed was not in fact exerted, and did not in fact procure the will, then it is her will and should stand, notwithstanding the existence of the confidential relations and confidence reposed; for the

law does not incapacitate persons occupying such positions of trust from receiving the bounty of the testatrix, and does not impose upon them the duty of refusing such bounty or advising or persuading the testatrix not to give it.

The contestant seems to contend that the person occupying such confidential relations must do or say nothing to influence the action of the testator in his favor. This is extending the principle too far. Technical morality does not inhibit a person standing in confidential relations to another, who reposes confidence in him, from using or exerting any influence whatever to obtain a benefit to himself of a bounty bestowed by the last will of such other person. If the influence exerted is not what in law is termed "undue influence," technical morality is not violated by its use.

The contestant requested, and the court charged in the language of the request, that "influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeal to the affections, cannot be properly termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another."

This is a correct statement of the law, and in connection with the other instructions given relative to undue influence, was all that the case required.

There appearing no error in the record, it must be certified to the Circuit and Probate Courts that the will propounded as the last will of Eliza H. Disbrow, deceased, is her last will, and is entitled to be admitted to probate as such. The proponent will recover costs.

CAMPBELL, J., concurred.

COOLEY, C. J., and SHEERWOOD, J., concurred in the result.

CUMMINGS vs. COREY.

[58 Michigan, 494.]

CONSTRUCTION OF A WILL.—EXECUTOR AS TRUSTEE AND BENEFICIARY.

The provisions of a will, so long as they are lawful, must be so construed as to carry out the evident intention of the testator. The executor of a will may be at once trustee and beneficiary under it.

APPEAL from a decree in favor of the plaintiff. The will over which the contest was made was as follows:

I, Jennie S. Corey, of Lansing, Ingham county, State of Michigan, do make this my last will and testament: I give to my mother, Lovina Spaulding, during her lifetime, the house which she now occupies in the village of Manchester, Mich. I also desire that the sum of one hundred dollars be paid her yearly as long as she may live, and more each year should she need it, as I desire that she may want for nothing so long as there may be anything belonging to me left. And at her death it is my wish that the house and lot be sold, and whatever it may bring be equally divided between my two nieces, Jennie and Clara Annabil. Also that the sum of twenty-five dollars be paid to each of them yearly until their marriage. My piano I give to Mary and Nellie, and should either wish to take the piano on leaving home, let her pay the other for her half. My watch and chain I give to my niece, Jennie L. Annabil; also set of corals, plain gold ring, scarlet and black lace shawl. I give my woolen shawl, and all worsted dresses that I may have at my death, to my sister, Nettie C. Annabil, and to my sister and Jennie I leave all books which I may have on side book-case, and those which that contains I wish to remain here as long as my husband makes this his home, and if at any time he should wish to, and house or his home should be broken up, I wish Mary and Nellie to take what books they would like and send whatever they do not care to retain to my sister. My garnet silk, and my point-lace, gold bracelets, gold chain, and one gold ring, also one set of silver spoons, I wish my dear

little Nellie to have ; to Mary I give my best black silk, fur cloak, and sealskin furs, set of cameos, one set of silver spoons, one plain gold ring, with part of point-lace ; the remainder of my clothing, whatever it may be, I wish to have divided equally between Mary, Jennie, Nellie and Clara, giving to each one that which will be of the most service to them ; my beds and bedding I wish to remain where they are until my husband may make some change in his home, then I wish to have it equally divided between my two girls, Mary and Nellie, and two nieces, Jennie and Clara Annabil. I wish to be perfectly just in disposing of what I may have, and would gladly have remembered my dear brother's children at this present time, but there are good and proper reasons why I should not, and in after years perhaps it will be of more use to them. I have said that I wished to be perfectly just, yet many may question my judgment somewhat in what I am about to do ; yet to me it seems perfectly right. As my dear husband, David R. Corey, is in poor health, and is more to me than all the world besides, I wish him to have the use, during his lifetime, of the remainder of my property, real and personal, about our home, not hitherto disposed of, including the house we now occupy, and all real estate mortgages which I may have at my death. I earnestly desire and hope that the property may be invested in the same way that it is now, and as I have kept it for many years, and at his death I wish all to be divided equally between my sister Nettie's and brother George's children, and Mary and Nellie. In no case, unless a long sickness should occur, do I wish him to use the principal, as the interest will be ample for all ordinary wants, but should it in any case be necessary for his comfort to use more than the interest, I wish him to do so. I also give him small diamond ring which he now wears, and the one he gave me before our marriage I wish him to give the daughter that marries first. To my dear friend, Mary S. Vandegieft, of Manchester, Mich., I give my gold ear-rings and the gold thimble she gave me on my wedding-day. And I hereby appoint David R. Corey executor of this my last will and testament.

In witness whereof, I hereunto set my hand and seal this 9th day of December, 1881.

JENNIE S. COREY.

Signed, sealed and acknowledged by Jennie S. Corey to be her last will and testament.

MRS. HELEN CRAWFORD.

ANSON L. CRAWFORD.

PELEY G. COREY.

Admitted to probate February 14th, 1882.

The other facts sufficiently appear in the opinion.

L. D. Johnson and *R. C. Ostrander*, for complainants.

Edward Cahill, for defendant.

SHERWOOD, J. The bill of complaint in this cause is filed by the creditors of the defendant to reach equitable interests in property under his control, and which complainants claim should be applied to the satisfaction of their judgment obtained against him, upon which execution has been issued and returned unsatisfied for want of property out of which to make the same.

For several years prior to the filing of complainants' bill the defendant had been engaged in the mercantile business in the counties of Ingham and Ionia, and about a year before this suit was commenced became insolvent, being indebted several thousand dollars more than he was able to pay. He was at that time married to a widow lady who was the owner of property in her own right to the amount of over \$10,000. After the defendant became insolvent his wife died, leaving, besides himself, who was in feeble health, an aged mother. During her last illness, Mrs. Corey made her will, and named therein her husband as her executor.

By this will it cannot fail to be observed that the controlling idea of the testatrix was—*first*, to secure and protect her husband, who was then without the means of support, and an infirm old mother from want and destitution; and *second*, in doing this, to so manage the estate that as much as possible

might be saved to be transmitted, after their death, to her other relations named in the will. Notwithstanding the great financial embarrassment under which her husband was laboring at the time the will was made, it appears that his wife had perfect confidence in his ability and integrity, to give him the control and management of her property, and have him execute her will, and carry out the trusts she had created, including that wherein he himself was the beneficiary. After his wife's death the will was probated, and the defendant was appointed her executor, gave the required bonds, made and returned an inventory of the property of the estate, entered actively upon the discharge of his duties, and has ever since continued in the administration of the trust assumed.

The complainants by their bill seek to reach the property of the defendant, which, it alleges, he has concealed or put beyond the reach of an execution, and which consists of that which he annually receives from the estate of his deceased wife under the will, and prays for a discovery, the appointment of a receiver, etc.

The defendant's answer was excepted to for insufficiency, and he made a second answer. This being excepted to for the same reason, it was submitted to the circuit judge, who sustained the exceptions and required the defendant to answer over. This the defendant declined to do, and thereupon the bill was taken as confessed, and a receiver was appointed by the court. From this order appointing a receiver the defendant appeals to this court for a review of the proceedings, and to obtain a construction of the provisions of the will relating to the bequests therein contained to him and for his use.

The order appealed from takes the bill as confessed for want of answer as to all matters to which the exceptions relate. It appoints a receiver, and directs the defendant to turn over to him the accumulated rents, interest and profits, and all property not exempt from execution, in which the rents, interest and profits may be invested; also, from time to time, all future rents, interest, and profits in excess of the annuity payable to Lovina Spaulding under the will.

The bill is not one in aid of execution. No levy has been

made upon any property to which reference is made in the bill. It must be treated as a bill to have complainants' judgment paid out of choses in action or other personal property of the debtor not liable to execution, which in equity should be liable to the payment of his debts.

The second answer makes the will of the testatrix a part thereof, and denies every allegations in the bill tending to show that defendant has property of any kind which he has concealed, or equitable interests which he refuses to disclose, except that which came from his wife's estate. It admits that he is in possession of certain property as executor of her estate, but of this the inventory is on file in the office of the judge of probate, and it could hardly be necessary to come into a court of equity to obtain discovery of the property therein mentioned.

By taking the bill as confessed, notwithstanding the answer, the complainant must be held to admit the statements of the answer to be true, and to deny the sufficiency of the facts stated to make out a defense. These facts, as the record presents them, are: "(1) That defendant is insolvent; that he has no money or other property, real or personal, or things in action, due him, or held in trust for him (except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than defendant). (2.) That the only property in his possession or under his control is that which came into his possession as executor of his late wife's estate under a will; that he gave bonds as such executor to faithfully administer the trust, and has not yet been discharged. (3.) That the income only of this property so in his hands was available for the purpose of paying legacies, and for his own use. (4.) That said income did not exceed six hundred dollars per annum, and was barely sufficient for defendant's support, and to pay the minimum sum required to be paid annually to the other beneficiaries."

Under these facts, which we think must be taken as admitted by the complainant, the court, in making the decree he has in this case, must substantially hold that the income to be derived from the estate of Mrs. Corey, without regard to the amount,

or whether there is or not more than sufficient for defendant's support, may be taken by defendant's creditors; and to secure this the estate may be taken out of the hands of the person designated by the testatrix and appointed by the judge of probate, and given over to the custody of a receiver receiving his authority of another jurisdiction.

The complainants' counsel contend that the testatrix intended that, subject to the payment of the annuities, the defendant should have absolute control of the principal and right to dispose of it for his own use, influenced and not restricted by the request in relation to the manner in which it should be invested and his use of it; and whether this be so or not, the defendant is given at least an unconditional life-estate, charged with the annuities, but one of which (that in favor of Lovina Spaulding) is unexpired, so far as the pleadings disclose; that this estate is devised directly to him as the legatee thereof, not as executor; that it is not by reason of his duties as executor that he is entitled to the possession and to receive the rents and profits of the property; that that right is created, exists and is exercised independent of any such duties, and no words of grant or devise are employed to indicate a purpose that any estate should pass to or vest in the executor, nor is that necessary for the exercise of any of the powers conferred on the executor.

We are not able to agree with this contention of the complainants' counsel, but are clearly of the opinion that under the provisions of the will the property is held by the defendant as executor in trust for himself and others as beneficiaries; *i. e.*, in trust (1) to pay the annuities out of the rents and profits; (2) to pay himself the remainder of the rents and profits; (3) to preserve the principal for those entitled to the remainder estate at his death; and that the trust, having been created by, and the funds so held in trust having proceeded from, some person other than the defendant, his interest therein is protected from creditors. The complainants' bill can be regarded as a creditors' bill only, and that brings this case within the exception contained in the statute. (See How. Stat. § 6,614.) Mrs. Corey herself drew the will under consideration. She

was not an expert in draughting such instruments, but succeeded very well, we think, in writing out her desires and intentions in regard to her property, and it is our duty to construe the instrument in such manner as to carry out those intentions, and not disregard her purposes if they were lawful. (*Jones v. Jones*, 25 Mich. 401.)

When we come to consider the circumstances under which this lady made her will, it seems to us the construction asked for by complainants' counsel, and the one substantially acceded to by the learned circuit judge who made the decree in this case, could never have entered the mind of the testatrix. On the contrary, the effect of such a construction was unquestionably what she wished to avoid. What she sought to do, so far as the will related to her husband, was to secure to him a sufficient amount to support and make him comfortable through life, and place it in such manner that it could not be taken to liquidate her husband's insolvent indebtedness. This was lawful, judicious, kind and commendable. The construction claimed by complainants' counsel would completely defeat the intention of this wife, and the whole object and scope of her will, so far as it relates to her husband, by taking her property thus set apart for him, and placing it in the hands of a stranger, with directions to apply it to the payment of the very indebtedness which it had been her object to escape. Mr. Corey was an invalid at the time the will was made, and the testatrix knew all about his insolvency, and undoubtedly of his indebtedness, and of his inability to support himself, much less to pay his debts. And with the clearly avowed purpose of the testatrix (in consequence of other relatives having a claim upon her bounty) to leave for her husband only enough for his reasonable support, how it could ever have been thought that justice requires that this little sustenance fund should be turned over to the husband's creditors is more than we can conceive. Courts in the name of justice may commit such errors, but neither law nor equity can ever tolerate them.

We are not, in this case, called upon to construe a contract where the minds of several parties must be found to have met

and concurred, to give effect to the instrument, but simply to ascertain the intention of Mrs. Corey at the time she made the will in question. In the first instance, the testatrix provided for the support and maintenance of her mother in comfort so long as she should live, and it was the executor's duty to see that that was done; and, in the language of Mrs. Corey, he was to see to it "that she want for nothing so long as there may be anything belonging to me left." She thus limits her bounty to her mother only by the extent of her property, provided the mother's necessities require it. What that necessity might be was then to her unknown, but she was not afraid to leave it to the discretion of her husband, whose kindness, prudence and affection she had known and tested for years, to ascertain and supply. This watchful care the decree of the court, under the views of complainants' counsel, should, in the event of the husband's neglect to pay his insolvent debts, be turned to the cold indifference of a stranger who occupies his place in the interest of mercenary creditors residing in a foreign State. The humanity of the law will never allow such perversion of its teachings, or the perpetration of such injustice. The testatrix, after providing for her mother and the payment of two small annuities of \$25 each to two of her nieces, and making a few other minor bequests to her relatives, says: "As my dear husband, David R. Corey, is in poor health, and is more to me than all the world besides, I wish him to have the use, during his lifetime, of the remainder of my property," etc. Then follows the injunction to keep the property invested, and the admonition to use only the income, except in case of sickness or necessity, when he could draw on the principal, and giving the remainder after his death to her brother's and sister's children. This lady's will shows not only consideration and affection, but judgment and discretion. If she had appointed any other person her executor, we doubt if counsel for complainants' or any one else would have ever entertained the idea for a moment that he was any more than a trustee for the beneficiaries under the will. No particular form of words is necessary to create a trust. Any language in a will indicating that the donee is to hold the devise or bequest for the benefit of others, in whole or in part, is sufficient; or,

when one is charged with a duty respecting it, from the performance of which others are to reap a benefit, the property is in his hands as a trust fund. (1 Perry on Trusts, § 112; *Harding v. Glyn*, 1 Atk. 469; *Pushman v. Filliter*, 3 Ves. 7; *Brest v. Offley*, 1 Ch. Rep. 246; *Moriarty v. Martin*, 3 Ir. Ch. 26; *Bernard v. Minshull*, 1 John. 276; *Cook v. Ellington*, 6 Jones Eq. 371; *Warner v. Bates*, 98 Mass. 274.) We think the language of this will creates a trust, and that the execution of the same is devolved upon the executor. (1 Perry on Trusts, § 262; *Richardson v. Knight*, 69 Me. 285; *Pettingill v. Pettingill*, 60 Me. 412; *Wilson's Estate*, 2 Penn. St. 325; *Williams v. Conrad*, 30 Barb. 524.) There is no legal objection to his being at the same time trustee and beneficiary. (1 Perry on Trusts, § 117; *Whiting v. Whiting*, 4 Gray, 240; *Carr v. Living*, 28 Beav. 644; *Andrews v. Bank of Cape Ann*, 3 Allen, 313; *Chase v. Chase*, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 340; *Gilbert v. Bennett*, 10 Sim. 371.)

This case comes clearly within the exception of the statute which permits the filing of the complainants' bill (How. Stat. § 6,614), and which was intended to apply to this class of cases. (*Craig v. Hone*, 2 Edw. Ch. 569.) The statute was intended for the benefit of the needy and unfortunate, and its provisions should be made to apply to all cases coming within its spirit, which has always been the rule of this court. (*Alvord v. Lent*, 23 Mich. 369.) There is no surplus to be looked after or reached in this case. The answer shows, and it is one of the things that must be taken as admitted, that the income is barely sufficient for the payment of the legacies and the defendant's support, but it is impossible for any one to tell what amount of either principal or interest, or of both, may yet be required for the support of the defendant and testatrix's mother, and the whole estate is in trust for both of those purposes. It is difficult to see how this question can be determined before the decease of these beneficiaries, and then whatever there may be will pass to the other legatees entitled thereto under the will.

The decree of the circuit judge must be reversed, with costs.

The other justices concurred.

BRONSON vs. PHELPS.

[58 Vermont, 612.]

CONSTRUCTION OF A WILL.

The testator gave an annuity of \$200 to his sister, and directed \$3,300 to be paid at her death to her children "and their representatives, if deceased, excepting" W. At the date of the will, eight of the sister's children were living, and two deceased, one of whom was the mother of W. and the plaintiff: *Held*, that it was clearly not the intention of the testator to exclude the issue of the two persons deceased; and that the plaintiff was entitled to share in the bequest as a primary legatee.

APPEAL from a decree of the Probate Court. Heard by the court, September Term, 1885, Taft, J., presiding. Decree of the Probate Court affirmed. The case is stated in the opinion.

A. P. Hodges, for defendants.

C. W. Witters, for petitioner.

WALKER, J. Timothy P. Phelps, late of Milton, died in 1864, leaving a will dated October 8, 1863, which was duly probated.

The questions presented for decision arise under the following clause of said will, to wit: "I give to my sister, Clarissa Hodges, the sum of two hundred dollars annually, during her life, for her sole and separate use, to be paid to her by the said George Whittemore, or the legal owner or occupant of that part of my home farm situate in said Milton, and I make the payment of said last mentioned annuity a charge upon the said part of my home farm situate in said Milton.

"And at the decease of the said Clarissa, I give to the children of the said Clarissa and their representatives, if deceased, excepting George Wilber, the sum of three thousand three hundred dollars, to be paid to the said children in the same manner as said last mentioned annuity, and in a like manner of said

annuity to constitute a charge upon that part of said home farm situate in said Milton."

Eight of said Clarissa Hodges' children were living at the date of said testator's will. Two of her daughters had died before that date, leaving issue, namely: Caroline Hodges Romaine, who died seventeen years before said will was made, leaving one child named Clarissa Romaine; and Sophia Hodges Wilber, who died fourteen years before said will was made, leaving three children, to wit: Wallace Wilber, George Wilber, and Jane Wilber, the petitioner in this case, all of whom are mentioned in said will. Clarissa Hodges died in March, 1883, leaving the eight children who were living at date of the will, or their representatives, and the representatives of the two daughters who were deceased at the date of said will.

In 1883, the Probate Court, on due application, decreed that, if the said Clarissa deceased leaving lawful children or their representatives, the legal owner or occupant of that part of the home farm of said Phelps, situated in Milton, shall pay to said children, or their representatives, the sum of \$3,300, and that the payment thereof shall be a charge on that part of said farm situated in Milton. Which decree, on appeal and exceptions, was, in 1884, affirmed by the Supreme Court. The legal owner or occupant of said farm failed to pay said sum of \$3,300, and surrendered said farm to the children and heirs of said Clarissa, under and by virtue of said will and decree.

In 1885, Jane Wilber, in the name of Jane Wilber Bronson, she having married, brought her petition to the Probate Court, setting forth therein, that as one of the representatives of Sophia Hodges Wilber, a daughter of said Clarissa Hodges, is entitled to one-twentieth part of said farm, and praying the court to make such decree as will secure to her her right in said premises. Said Probate Court adjudged and decreed that said Jane Wilber Bronson was entitled to share with the children of said Clarissa Hodges, and the other representatives of her deceased children, except George Wilber, in that portion of said Phelps' estate which he willed to them under the foregoing clause of his will. The defendants appealed from said

order of Probate Court to the County Court, which court affirmed the order and decree of the Probate Court, and the question is now before this court, on exceptions to the judgment of the County Court.

The defendants, the eight children of said Clarissa, who were living at the date of said Phelps' will, and their representatives, contend that the representatives of Sophia Wilber and Caroline Romaine, the two daughters of said Clarissa, who died before the date of said will, are not entitled to share in said bequest, and claim that said bequest is a gift to a class living at the date of the will and the representatives of such of the class as are dead at the time of payment, and that the representatives take not by way of original substantive gift, but by way of substitution, and that none are capable of taking by way of substitution except such as represent members of the class who could have taken as original legatees at the date of the will.

But the petitioner does not found her claim to share in the bequest on a right to take her portion of a share which was given to her mother, and which her mother was capable of taking at the date of the will, but on the ground that she is entitled, as an original primary legatee, to her portion of such a share of the bequest as her mother would have taken if she had been capable of taking at the time of the payment or enjoyment of the bequest.

It is not questioned that the words, "their representatives," are used for and mean their *issue*, and have reference to certain issue of Clarissa's children, so far as they take under the clause of the will. And the question is whether under the words, "at the decease of said Clarissa I give to the children of the said Clarissa, and their representatives if deceased, excepting George Wilber," the issue of the children of Clarissa, who died before the making of the will, are included as objects of the gift.

The answer to this question depends upon the construction given to the language of the bequest.

The cardinal rule in the construction of wills is the intent of the testator; and that intent must prevail if it can clearly

be perceived from the will and is not contrary to some positive rule of law.

It is apparent from the other provisions of the will that there was no intention on the part of the testator to exclude the issue of the children of Clarissa, who were deceased when the will was made, from sharing in his estate, excepting George Wilber, one of the brothers of the petitioner, to whom he gives no specific, pecuniary, or residuary legacy, and whom he expressly excludes from sharing in the bequest in question. In another clause of the will he gives pecuniary legacies to Wallace Wilber and Clarissa Romaine; and also in another clause he gives an annuity to Jane Wilber, the petitioner, who was a member of his family after the death of her mother, and sixteen hundred dollars to her heirs at her death, if she shall have children born in lawful wedlock.

The \$3,300 given under the clause in question are to be paid to and divided among the class taking at a time subsequent to the death of the testator, to wit: at the decease of Clarissa.

It is the general rule of construction that words of survivorship in bequests of personal estate are to be referred to the period of division and enjoyment, unless there is a special intent to the contrary; and legacies given to a class of persons vest in those who answer the description and are capable of taking at the time of distribution or when the legacy takes effect. They who thus answer the description are deemed to be the objects of the gift.

The testator knew of the death of Sophia Wilber and Clarissa Romaine at the time he made his will, and that they had left children surviving them; and it is very evident that if he had intended to exclude their issue from sharing in the bequest, he would not have used the general language adopted by him in making it.

If he had intended to limit the gift to the children of Clarissa living at the date of his will, and their particular representatives, he would have used words apt to such a limitation, and made the bequest to the children living at that time, and to the representatives of such of the *then* living children

as shall decease before the time of enjoyment, thereby making it an original gift to the living children, and a substitutional one to their issue.

The general words of the bequest must receive their ordinary interpretation, and be read in their ordinary sense and meaning unless some other is clearly indicated. As there are no expressions in this or any other clause of the will showing any intent of the testator to use the words, conferring the bequest, in a narrow or restricted sense, they cannot be construed as a limitation to the living children and the issue of such. Without any studied effort to restrict its meaning, the language used indicates that the testator contemplated all her children, and both future and past deaths of such children, and an ascertainment at a future period of distribution of those who might then be dead, and a consequent provision for their issue, if any; and that necessarily would include among objects of the gift the issue of such of her children as were dead at the date of the will. The words of the clause referred to, all taken together, showed that the testator had in mind Clarissa's deceased children and their representatives, and intended that her said representatives, excepting George Wilber, should share in the bequest as objects of the class to whom the gift was primarily made. If not so, it may well be asked, why did he expressly exclude George Wilber alone? The exception of one of said issue has irresistible weight and force in reaching the conclusion that the testator intended the bequest as a gift to all the children of Clarissa living at her decease, and to the issue of such of her children as had then deceased, excepting George Wilber, as a class, intending the issue of each deceased child to take such share as their parents would have taken if capable of taking.

The words, "their representatives, if deceased," are connected by the copulative conjunction "and" with children, showing that the representatives and children are embraced as a class to whom the gift was primarily made, and that the gift was clearly intended to include the representatives of all her deceased children at the time of enjoyment without regard to whether they died before or after the date of the will. The

word *their* refers to *all* of Clarissa's children, and not to those only who were living at the date of the will.

The words of the clause following the gift, "to be paid to said children," &c., are not to be construed as limiting the bequest to *living* children of Clarissa, but as indicating that the bequest is to be divided among the legatees according to the number of children, and families of deceased children, who are entitled to take; so that the issue of any deceased child would take, amongst them, the share only which their parent would have been entitled to if living at the time of distribution.

We think the bequest clearly falls within the rule of a gift to such of a class as shall be living at a stated time, or their issue, and is therefore to be construed as introducing the issue of such of the class as at the time stated for the enjoyment shall be dead, and this by way of addition to the class and not by way of substitution, and thus admitting the issue of persons dead at the date of the will, excepting those expressly excluded. (3 Jar. Wills, 632, 636; *Adams v. Adams*, L. R. 14 Eq. Cas. 246; *Wheeler v. Allen*, 54 Me. 232.)

And we are of the opinion that the bequest is an original substantive gift to the children of Clarissa living at the time of her decease, and the issue of such of them as should be then dead, leaving issue, excepting the one expressly excluded. And that the issue of Sophia Wilber and Caroline Romaine, excepting George Wilber, are entitled to share in the bequest as primary legatees, taking the share their mothers would have taken if living.

The leading cases in England and America support this conclusion.

In *Tytherleigh v. Harbin* (6 Sim. 329), where a testator devised an estate to trustees in trust for R. T. for life, and at his decease to convey the same "unto or amongst all and every of such one or more of the child or children of the said R. T. who shall be living at the time of his decease, and the issue of such of them as shall be then dead leaving issue," the question was whether the issue of a child of R. T., who was dead at the date of the will, were included in the devise, and Sir L. Shadwell, V. C., decided that the gift included these objects; and

that the devise was an original substantive gift to the children of R. T. living at the time of his decease, and the issue of such of them as should be then dead leaving issue.

In *Clay v. Pennington* (7 Sim. 370), where a testator in a certain event bequeathed a residuary fund unto the children of his brother B., and their lawful issue; some of the children of B. were dead at the date of the will, but it was held that the issue of such children were entitled to participate with the other children and their issue, it being considered that the gift included all the descendants of the brother who were living at the period in question.

In *Rust v. Baker* (8 Sim. 443), where a testator gave a fraction of his residuary personal estate to A., B., and C., and the children of D., and the issue of such of his children as should have departed this life; long before the date of the will D. had had a child, who went abroad, and had not been heard of for twenty years. It was held that he must be presumed to have been dead at the date of the will, and that his children were entitled under the bequest. In *Bebb v. Beckwith* (2 Beav. 308), under a similar bequest it was held that the issue of a child dead at the date of a will were entitled to share in the same.

In *Teed v. Morton* (60 N. Y. 502), the proceeds of certain real estate at the death of the testator's son, William, without issue, were to be paid to and divided equally among the surviving children of the testator and the issue of such of them as may have died leaving issue, such issue to take the share their parents would have taken if living. At the time of the execution of the will, and at the time of his death, the testator had five children living, and the issue of five children who had previously died were also living. William died without issue after the death of the testator. Four other children of the testator, who survived him, died, leaving issue, before the death of William. And the question was, whether, under the words "my surviving children, and the issue of such of them as may have died leaving issue," the issue of the children of the testator who died before the making of the will are included. The court held that the issue of the testator's deceased children

living at the death of his son William took as primary legatees, under the clause in question, without distinction as between those whose parents died before and those who died after the making of the will. And that the word "them" referred to all his children and not to the surviving children only.

Was there any doubt as to whether this bequest was an original and independent gift to the children of Clarissa living at her decease and the issue of any children who had deceased before that time, whether before or after the date of the will, and if the petitioner's claim was apparently founded upon mere substitution, her right to share in the bequest as the representative of her deceased mother is substantiated by numerous authorities. Observing the rule that in the construction of wills the intention of the testator must prevail, if they are conformable to the principles of law, and that the language used should receive its ordinary interpretation, and so far as possible effect be given to each distinct provision, courts anxiously lay hold of every expression as a ground of avoiding a construction which may defeat the testator's intention, by excluding the issue of a deceased child from participating in a general family provision. The impression made in reading this bequest in connection with the other provisions of the will is, that the testator intended it as a family provision for all the children of Clarissa and their representatives if deceased at the time of her decease, except her grandchild, George Wilber. This exception indicates very strongly that the testator had in view the issue of the children of Clarissa, who were deceased at the time of the making of the will. The exception of one *only* shows that he had intended to include the other issue of said deceased children among the objects of the bequest, and such intention must govern. It is decisive.

In *Giles v. Giles* (8 Sim. 360), a testator bequeathed the general residue to trustees, in trust for all his children living at the decease of his wife, and if any such children or child should be deceased before his wife and should leave issue, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, with a proviso that, until the

portions thereby provided for any of the said children of his said sons or *daughters* who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion for the maintenance of the child entitled in expectancy. The testator at the date of his will had four sons and one daughter living, and he had had another daughter who was then dead, leaving children. The question was, whether these children of the deceased daughter were objects of the bequest, and Sir L. Shadwell, V. C., decided that they were, relying on the expression "sons and daughters," which he considered to indicate that the testator had the issue of the deceased daughter in his view, he having but one daughter living at the date of the will. (See also *Jarvis v. Pond*, 9 Sim. 549; *In re Sibley's Trusts*, L. R. 5 Ch. Div. 494; *Gowling v. Thompson*, L. R. 11 Eq. 366, n.)

These cases are strong authorities showing that the intention of the testator, as evidenced by the will, is controlling in construing the language used by the testator in making a bequest, and must govern in determining who are the objects of it.

The judgment of the court is that the judgment of the County Court affirming the decree of the Probate Court is affirmed, and the same is ordered to be certified to the Probate Court.

WILL OF WALTER.

[64 Wisconsin, 487.]

VALID WILL IN A LANGUAGE WHICH THE TESTATOR DOES NOT UNDERSTAND.

A will drawn in accordance with the instructions of a person of sound mind, and executed by him in due form of law, with full and accurate knowledge of its contents, is valid, although it is written in the English language and the testator did not understand that language.

APPEAL from the Circuit Court for Sheboygan County.

The issue of *devisavit vel non* was tried by the court, and resulted in the following findings of fact:

"(1.) That said Minna Walter died on the 6th day of February, 1884, at the town of Sheboygan Falls, in Sheboygan county, and an inhabitant of said county. (2.) That the instrument propounded as the will of said deceased was, on the 23d day of November, 1881, signed by said Minna Walter by affixing her mark thereto in the presence of three witnesses, who subscribed the same, and her name was therein signed by Francis Williams in her presence and by her express direction. (3.) That said will was written in the English language at the request and according to the directions of said Minna Walter, and she was a German and did not understand the English language; but said Minna Walter fully stated to Francis Williams, who draughted said instrument, through an interpreter who understood both languages, the objects and bequests therein written; and after said instrument was written it was read over to her, and explained in German by said interpreter; and said instrument fully expressed her purposes as there declared. (4.) That said Minna Walter was at all said times of sound mind, memory, and understanding, and of lawful age, and under no constraint. (5.) That said instrument so propounded for probate was by said Minna Walter then and there, in the presence of three subscribing witnesses, declared as her will; and said witnesses, at her request, and in her presence and the presence of each other, subscribed the said instrument under the attestation clause as subscribing witnesses, and said witnesses were competent thereto."

Conrad Krez, for appellants.

Wm. H. Seaman, for respondent.

LYON, J. The learned counsel for the appellants challenges the accuracy of each and every finding of fact except the first, which states the residence of the testatrix and the date of her death, and that portion of the third which finds she was a

German and did not understand the English language. He argues with much ingenuity that the testimony fails to prove any of the propositions of fact thus challenged. After an attentive perusal of the testimony we find ourselves unable to agree with counsel. We think that every fact essential to the validity of the will was established by a fair preponderance of the testimony ; or, at least, that there was no such clear preponderance of testimony against any material finding of fact as will authorize this court to set it aside. We do not deem it necessary, in this opinion, to set out the testimony or discuss it at length. The statement of our conclusions therefrom must suffice.

Aside from the finding that the testatrix did not understand the language in which her alleged will was written, it cannot be doubted that the other findings of fact fully justify the admitting of the instrument to probate as her last will and testament. We are thus brought to consider the only question of law presented by this appeal, to wit: should an instrument executed with all the formalities which the law makes essential to a valid execution of a will, which purports to be the last will and testament of the deceased person so executing it, and which expresses his will and intentions, be denied probate for the sole reason that such person did not understand the language in which the instrument was written ?

This is an interesting, and, perhaps, an important question. It has not heretofore been raised in this court to our knowledge, and the industry of counsel has failed to find a direct adjudication of the question elsewhere. However, in *Redfield on Wills*, to the statement in the text that "it seems to be well settled that the testator may put his will in any language he may choose," there is a note in which the author says: "We doubt if the common law will allow of a written will being expressed in a language not understood by the testator. That would seem indispensable to any understanding execution of the instrument." (Vol. 1, p. 166 [4th ed.], note 8.) No case or authority is cited to support the opinion intimated in the last extract. The reason given for this opinion is, in effect, that a person cannot have an understanding of the con-

tents of an instrument unless it be written in a language he knows. True, he may not get such understanding by reading the instrument himself, but there are other methods by which he can be accurately informed thereof, although he may not be able to read understandingly a word of the instrument. A vast amount of accurate knowledge is alone imparted to the mass of mankind by means of translations from languages understood by but few. Such is the foundation of our belief in very many most important accepted truths in theology, science, and history. Important writings are frequently signed without perusal, the signer relying upon the statement of another who knows what the instrument contains, as to its contents. If the informant states such contents truly, the signer knows just what he has signed. Were an issue made up as to whether the signer of a written instrument knew its contents when he signed it, and the proofs should show that he never read it, but was accurately informed of its contents orally, before he signed it, by a person who had read it, the issue would necessarily be found in the affirmative—that is, that the signer knew the contents of the instrument.

There can be no doubt, we think, that a person who signs an obligation or promise, with knowledge of its contents, imparted to him by parol, is liable thereon, although it may be written in a language he does not understand. The question is not by what means or instrumentalities the signer was informed of the contents of the instrument, but did he know its contents when he signed it.

No good reason is perceived why this is not also true of wills. Of course it is essential to a valid will that the testator should have had an intelligent understanding and comprehension of its contents when he executed it. The formalities required by law in the execution of wills are prescribed for the purpose (among others) of preserving satisfactory evidence that the testator in each case had such understanding of the contents of his will. But the law does not require that he shall read his will before execution, or be able to read it, as a condition to its validity. If such were the law, the blind, or those persons who from illiteracy or other cause are unable to

read, could never make a valid written testament. The same would be true of many persons who may desire to execute a written will when *in extremis*, and who are otherwise competent to do so. It has long been held that persons thus circumstanced may execute valid written wills. And if the will of any such person is drawn in accordance with his instructions, although not read over to him, it seems now to be settled that, if otherwise sufficient, it is a valid will. (1 Redfield on Wills, p. 57, ch. 3, § 6, subd. 5.)

We perceive no substantial difference in principle between the cases above referred to and one in which a will is drawn up in a language which the testator does not understand. In cases belonging to either class the court should require satisfactory proof that the testator was correctly informed of the contents of the instrument he was about to execute. Such proof was made in the present case, and in addition thereto it was proved that the instrument was drawn in strict compliance with the instructions of the testatrix in that behalf.

In view of the well known fact that quite a large percentage of the people of this State do not understand the English language, and of the probability that many wills of such people, written in English, have been admitted to probate, we should adopt the rule here suggested, even though the argument against it were much stronger than it is. Otherwise great mischief might be done by defeating the real will of the testators, carefully expressed, and duly verified in the manner prescribed by statute, and by unsettling estates supposed to be settled, and divesting rights of property believed to be fully vested. If the same circumstances had existed generally in this country when Judge Redfield wrote the intimation above mentioned, we greatly doubt whether he would have thought that the rule there suggested (even conceding it to be a rule of the common law) was at all applicable to the condition and circumstances of our people.

Our conclusion is that, because the instrument in question was freely executed by the testatrix in due form of law, with full and accurate knowledge of its contents, and in accordance with her instructions (she being of sound mind), it was prop-

erly admitted to probate and established as her last will and testament, notwithstanding it was written in the English language, which she could not read or understand.

The judgment of the Circuit Court is affirmed.

BALLENTINE vs. WOOD.

[42 New Jersey Equity, 552.]

**RESIDUARY DEVISE.—VESTED REMAINDER.—DISTRIBUTION OF
MONEY IN THE HANDS OF TRUSTEES.**

A testator devised certain lands, in trust, for the benefit of his wife and five children for their lives, and, after the death of the surviving child, the trust to cease and the land be sold and the proceeds divided among the "right heirs" of his children as tenants in common, the issue of any child to take their parent's share: *Held*, that such grandchild had a vested remainder in the residuary devise, subject to open and let in any brother or sister.

BILL for relief. On exceptions to master's report and application for instructions as to distribution of money in the hands of trustees.

J. Augustus Fay, Jr., for complainant.

H. C. Pitney, for Helen B. Wood.

W. L. Dayton, for John B. Wood and others.

A. Flanders, for John De Camp and others.

THE CHANCELLOR. Two objections are presented under the exceptions to the master's report. One is that the master has reported an allowance of commissions to the complainant, and the other is as to the amount of such allowance.

It was proper and necessary to establish the amount of

commissions in taking the account of the trustee, in order that distribution might be ordered.

The master has allowed the trustee three per cent. additional commissions upon \$35,194 95 of income upon which the trustee in his first account was allowed two per cent. commissions. I see no reason for making this extra allowance. In his intermediate account, filed in 1877, to which the master refers as the first intermediate account, the Orphans' Court fixed the trustee's commissions upon the income received up to that time. The agreement made by the exceptants in 1880, that the trustee should receive five per cent. commissions on the gross receipts of the estate, provided that he should not receive more than \$500 in any year or in a greater proportion for any part of a year, expressly provided also that it should be retroactive, so that the sum to be allowed to the trustee upon his second accounting should be determined on the basis thereof, but that it should have no other retroactive effect. The master has applied it to the first accounting. Therefore, so far as the exceptants are concerned, the award of commissions upon the \$35,194 95 is unlawful. The agreement upon the same subject, made by other persons interested in the estate, covered the whole period from the beginning of the trustee's administration. The exception must be allowed.

A question was presented upon the argument (but not under the exceptions) as to the right of Mrs. Helen B. Wood to participate in the distribution of the moneys in the hands of the trustee.

James Wood, deceased, by his will devised to his executors, as trustees, certain specified lands, in trust, to permit his wife to occupy for life, or so long as she should remain his widow, certain parts of that property; to lease the rest (and after her death or remarriage to lease it all), and after deducting the necessary expenses of repairs, improvements and insurance, to pay over the net proceeds arising from the rents to his wife so long as she should remain his widow, and his five children, William N., Sarah Ann, Jane Elizabeth, Theodore T. and Laura Louisa, share and share alike; and after the death or marriage of his wife to pay over such net proceeds arising

from the rents to his before-mentioned five children in equal shares; and in case of the death of any one or more of his children without leaving lawful issue, then to pay over the share or shares of such deceased child or children to his, the testator's, surviving child or children, in equal parts or shares; and in case of the death of any of his children, leaving lawful issue, then to pay over his or her share to and among said issue in equal parts or shares.

The testator gave power to the executors, at their discretion, to sell parts of the property, and provided that in case of sale the proceeds of sale should be invested, and that the interest should be paid over to and among his children, or their lawful issue, as directed in regard to the rents and profits of the property. He then provided that from and after the death of all his children the trust thereby created should cease and determine, and that the several tracts or parcels of land and premises thereinbefore mentioned and described (except so much thereof as might be sold by the executors) should go and descend, freed and discharged from all trusts whatever, to the respective right heirs of his children, in fee simple, to hold as tenants in common, and not as joint tenants; it being always understood that the child or children of any of his deceased children should take the part or share of the trust estate that the parent would have taken had the testator died intestate; and that in like manner all the moneys which the trustees, or the survivors or survivor of them, or the heirs of the survivor of them, may then have on hand, together with all securities for money be paid over, delivered or transferred to the respective right heirs of his, the testator's, before-mentioned children—the child or children of each deceased child taking the part or share to which the parent would be entitled. The will contains a residuary clause disposing of the residue of the testator's real estate, but that provision was revoked by a codicil by which the testator gave and devised the residue of his real estate to his executors, and to the survivors and survivor of them, and to the heirs of the survivor, in trust, to sell such residue at discretion, or to mortgage it to pay his debts; and he provided that the moneys arising from the sale, or

which might be borrowed on mortgage, together with the moneys due him on bonds, notes, books of account, stocks, or otherwise, or so much thereof as might be necessary for the purpose, should be appropriated in the payment of his debts and the expenses incident to the settlement of his estate; and he directed that the residue thereof should be invested and the dividends or interest thereof be paid over and divided to and among his five children; and that whenever, in the opinion of his executors or a majority of them, any of his children should require more than his or her share of the interest or dividends for his or her comfortable support and maintenance, his executors, or a majority of them, might pay over and deliver to such child or children a part or the whole of his or her one-fifth part or other proportion of the principal moneys or other property constituting such residue; and that at the death of any of his children, his or her part or share in such residue of the testator's estate be paid over to his or her child or children; and that if any of his children should die, leaving no lawful issue, his or her part or share in the residue be paid to the testator's surviving child or children, and to the child or children of such of the testator's children as should have died leaving children; it being always understood that the child or children are to take the part or share which their parent would have taken if living.

The testator's widow died in his lifetime. His children all survived him. The children are all dead. Two of the daughters died childless. Theodore T. Wood, one of the children of Theodore T. Wood, one of the testator's sons, survived his father, but died in the lifetime of the last survivor of the testator's children, without issue, leaving a widow, Helen B. Wood, to whom by his will he gave all his property. She claims to be entitled to an equal share with the children of her father-in-law who survived him. If the interest of her husband in the estate of his grandfather, the testator, was a vested interest, she is, as her husband's universal legatee and devisee, entitled to it.

It is urged by her counsel that the above-quoted provision of the codicil, that the moneys arising from the sale of the tes-

tator's real estate includes in its terms and was intended by the testator to embrace the proceeds of the sale of the real estate specifically devised, as well as the proceeds of that which may be termed the residuary real estate. But it is quite clear that such a construction is inadmissible. By the clause of the will by which the testator disposed of the residuary real estate, he provided that his executors should sell that property, and that out of the proceeds of sale and the moneys due him upon bonds, notes, books of account, stocks, or otherwise, his debts and the expenses of settling his estate should be paid, and he then disposed of the residue of those proceeds. By the before-mentioned codicil he revoked that devise and gave the property to his executors, in trust, to sell it or to raise money upon it by mortgage to pay his debts, and he then directed that the moneys arising from the sale of his real estate and which his executors might borrow on mortgage, together with the moneys due him on bonds, notes, books of account, stocks, or otherwise, or so much thereof as should be necessary for the purpose, be appropriated by his executors to the payment of his debts and the expenses incident to the settlement of his estate, and he directed that the residue be invested and that the dividends or the interest thereof be paid over and divided to and among his five children; and that at the death of any of his children, his or her part or share in such residue of his, the testator's, estate be paid over to his or her (the decedent's) child or children, &c. Although in the provision just quoted the testator gives direction as to the disposition of the proceeds of his real estate, and the language used by him, "the moneys arising from the sales of my real estate," is broad enough to include the proceeds of the sales of the land specifically devised, yet it is apparent from the context that he had in mind and referred only to the lands constituting the residue of his real estate. The claim of Mrs. Wood as to the lands specifically devised or the proceeds thereof depends upon the construction to be given to the provision of the clause of the will by which those lands and proceeds are disposed of after the death of the testator's children. That clause is as follows:

"And it is further my will that from and after the death of all my children, the trust hereby created shall cease and determine and the several tracts or parcels of land and premises hereinbefore mentioned and described (except so much thereof as may be sold as aforesaid) shall go and descend, freed and discharged from all trusts whatever, to the respective right heirs of my said children, in fee simple, to hold as tenants in common, and not as joint tenants; it being always understood that the child or children of any of my deceased children shall take the part or share of the said trust estate that the parent would have taken had I died intestate; and in like manner all the moneys which the said trustees, or the survivors or survivor of them, may then have on hand, together with all securities for money, be paid over, delivered or transferred to the respective right heirs of my said children, the child or children of each deceased child taking the part or share which the parent would be entitled to."

By the words "right heirs" in the clause, the testator meant children, as is evident from the accompanying qualifying provision that the child or children of any of his deceased children shall take the part or share that the parent would have taken. At the death of the last survivor of the testator's children the trust is to cease, and the property, if unsold, or if any shall have been sold, then so much as shall remain unsold, and the proceeds of that part of it which shall have been sold, shall go to the testator's grandchildren. The words "and descend" are merely superfluous. The word "descend" was used, not to express descent in the legal sense, but devolution by force of the devise, and the use of it was probably due to the fact that while the gift for life was to parents, the gift in remainder was to children. It is as if the testator had said "go down" to the children. The gift in remainder and the life estate vested at the same moment. The grandchildren who were alive at the death of the testator took the title to the remainder at his death by independent gift; for while the gift in the first instance is to the trustees for the life of the longest liver of the testator's children, the subsequent provision is that at the death of the

last survivor of the equitable life-tenants the trust is to be at an end and the property is to go to the grandchildren. But the estate taken by the grandchildren at the testator's death was subject to the liability to open and let in grandchildren born subsequently. The amount of the interest in each stock of grandchildren would, therefore, not be fixed absolutely (except by the death of the parent life-tenant) until the death of the last survivor of the life-tenants. But, subject to that liability to open, it was vested at the death of the testator. Theodore T. Wood, Jr., therefore, at his death, had a vested interest, which was subject to a liability to be diminished in amount by the birth of other children of his father, but only subject to that liability. It is to be observed that the gift is to the children individually, and not as a class; for it is expressly made to them as tenants in common, and not as joint tenants.

The cases which support the construction which I have put upon the provision under consideration are numerous. Among them may be mentioned *Wintermute v. Snyder*, 2 Gr. Ch. 489; *Howell v. Green*, 2 Vr. 570; *Van Dyke v. Vanderpool*, 1 McCart. 198; *Feit's Exrs. v. Vanatta*, 6 C. E. Gr. 84; *Beatty's Admr. v. Montgomery's Exr.*, Id. 324; *Herbert v. Post*, 11 C. E. Gr. 278, and s. o., on appeal, 12 C. E. Gr. 540. The cases cited by the counsel of those who oppose Mrs. Wood's claim are not in point. They are *Smith v. Butcher*, L. R. (10 Ch. Div.) 113; *Van Tilburgh v. Hollingshead*, 1 McCart. 32, and *Slack v. Bird*, 8 C. E. Gr. 238.

In *Smith v. Butcher* there was a gift of personalty, in trust, for the children of the testator's brother for life, with provision that on the death of either of them his or her share of the principal should go to his or her "lawful heirs." The words "lawful heirs" were held to be used in their ordinary sense. There was nothing in the context to prevent or militate against such construction. In *Van Tilburgh v. Hollingshead* the devise was to the testator's son, with provision that at his decease the property should go to his, his son's, "surviving children, according to law." It was held that the estate of the children was contingent upon their surviving their father,

the rule being that where an interest is given to one for life, and after his death to his surviving children, those only can take who are alive at the time the distribution takes place.

Slack v. Bird was a similar case with a like decision.

RUSLING vs. RUSLING'S EXECUTORS.

[42 New Jersey Equity, 594.]

HUSBAND AS TRUSTEE FOR HIS WIFE.—TESTAMENTARY GIFT IN SATISFACTION OF DEBT.

A husband received \$1,000 from his wife to invest for her, and paid her the interest thereon for the first year. By his will and verbal admissions he recognized his indebtedness to her. By a subsequent will he provided for the payment of all his just debts, "if any," and gave her \$2,000, payable in one year after his death, and the interest on \$4,000 during her lifetime, and stipulated that these gifts should be in lieu of her dower "or any other claim she may have against my estate." *Held*, (1) that the relation of the testator to his wife was that of a trustee; (2) that the statute of limitations did not run against her; (3) that the liability was not discharged by her general statements as to the motive of the transaction, or as to her having released her husband from liability; (4) that the testamentary gifts, having been accepted by her, the claim was thereby satisfied.

Isaac R. Wilson and *C. A. Skillman*, for complainant.

J. F. Rusling and *B. Gummere*, for defendants.

BIRD, V. C. Mrs. Rusling, the complainant, is the widow of Gershom Rusling, who died in 1881, leaving a last will, in which the defendants were named as executors. Mrs. Rusling brings this suit to recover \$1,000, and the interest thereon, which \$1,000 she alleges she gave to her husband in May, 1863, to invest for her.

I will set forth the principal facts. The testator married Mrs. Rusling in 1861. About the first of May, 1863, Mrs.

Rusling received \$1,000 as her own separate estate; this she gave to her husband to invest for her and to pay her the interest. I think he paid her the interest for the first year, after he accepted the trust which was thereby created. On December 5th, 1863, before the expiration of the first year after he received the \$1,000, Mr. Rusling made his will. In this will he directed that all his debts should be paid; gave to his wife \$120 yearly, so long as she remained his widow; gave her, also, the sum of \$1,000 in cash, using this language:

"The same being the amount of certain moneys which I received from her of her separate estate after my marriage with her, and which said sum I direct to be paid to her by my executors within one year from the time of my death, with interest thereon from the time of my death. And I further direct that all the household goods and furniture, silver-ware, and personal property of every description, which she had of her own separate property at and after her marriage with me, be given to and taken by her as her own property."

On September 23d, 1865, Mr. Rusling made and published another will, differing in the particulars above named in no material respect except that he made the \$120, \$180.

It is a fact that some of the children of Mr. Rusling by a former wife were greatly displeased with Mrs. Rusling's presence in the household without sharing any of the burdens thereof out of her separate estate. From time to time they expressed their displeasure to her, but when, does not appear to any degree of certainty. It is insisted that in view of this dissatisfaction, Mrs. Rusling gave this \$1,000 to her husband, and thereby, to that extent, contributed to the daily recurring wants. It will not be amiss to note that if she made any such donation, and Mr. Rusling so regarded it, it must have been after September 23d, 1865, the date of the last will named; for it will be seen that in that will he directed the \$1,000 to be paid to her, with interest.

On January 8th, 1873, Mr. Rusling executed another will, directing all his just debts to be paid; giving to his wife \$2,000, with interest from the time of his death, to be paid to

her in one year thereafter ; directing his executors to pay to her, annually, from the time of his death, a sum equal to the interest of \$3,000, and to invest a sum sufficient for that purpose ; making the same direction, as in the former wills, with respect to her personal property, and declaring the said gifts to be in lieu of her right of dower ; after which he made disposition of all the balance of his estate.

On October 4th, 1873, Mr. Rusling executed another will, in all material respects, so far as it affected Mrs. Rusling, like the one last referred to, except, in giving her the interest of \$3,000, he gave her the interest of \$4,000, and directed that such gifts be in lieu of " her right of dower or any other claim that she might have against my [his] estate."

During the year in which these last two wills were made Mrs. Rusling built herself a cottage at Ocean Grove, and for that purpose borrowed about \$900 of her husband, which, shortly thereafter, she paid back to him. This was done without any claim on her part of \$1,000, which she gave to him to invest in 1863, and without any accounting between them therefor.

On December 10th, 1874, Mr. Rusling made another will, directing his just debts to be paid, saying, " if any I have ;" giving to Mrs. Rusling the \$2,000, as in the two former wills last mentioned, and the interest of \$4,000 during her natural life if she should so long remain his widow, making the same directions as to her personal property, and declaring that such gifts should be in lieu of dower or any other claim against his estate, and disposing of all the balance of his estate.

The last will in the series, and which was admitted to probate, is dated January 4th, 1875, after which time Mr. Rusling lived about six years. In this will he directed " that all of my just debts, if any I have," should be paid. He gave to his wife \$2,000, and directed it should be paid to her with interest from his death, in one year thereafter ; gave to her the interest of \$4,000, to be paid to her annually, during her life, if she so long remained his widow, directing that all her goods, silver-ware and personal property of every de-

scription should be taken by her as her own separate property, and adding:

"And it is my will, and I do hereby direct, that the said bequests in favor of my said wife shall be in lieu and in bar of her right of dower, or any other claim that she may have against my estate."

About the time of making these last wills, and before, Mr. Rusling said that his wife had brought him \$1,000, and that he had invested it for her; that he had paid her one year's interest, and that he wanted her to have it after his death.

After the making of these wills, and after Mr. Rusling had said that he had this \$1,000 from his wife, she said that she had given Mr. Rusling \$1,000, and when the witness to whom she made the statement was asked if she gave any reason for so doing Mrs. Rusling replied, that it was "to have peace in the family;" that "she had unpleasant times with them, . . . because she didn't bring anything in the family, and she gave him \$1,000 to make peace, and afterwards," she said, "there was peace, they were satisfied." One witness says that Mrs. Rusling told this to her frequently. Another witness says that about the same time Mrs. Rusling told her that she had given Mr. Rusling \$1,000, and that he had never given her a cent of interest. In 1876 or 1877 Mrs. Rusling told another witness that she had given her husband \$1,000 in 1863 "to pacify him and his children," saying, "there existed a little unpleasantness in the family, . . . they had an idea that she ought to have brought something into the family as his other wives had done, and that in order to pacify them she gave him this \$1,000." While it is true that Mrs. Rusling either denies making these statements, or says she does not remember them, all rules applicable in such cases require me to regard these alleged statements as established facts, the decided preponderance of testimony being against her.

From these facts the first question is—What relation was Mr. Rusling in to Mrs. Rusling, with respect to her separate estate, at any time during their married lives? One of his wills shows that he accepted from her the \$1,000, and by the same will gave it back to her with interest from the time of

his death. This will bears date December 5th, 1863, about six months after he received the money. This clause was retained in the next will, dated September 23d, 1865. These unmistakable declarations, with the other undisputed facts, establish the relation of principal and agent, or what I think more clearly expresses the truth, of *cestui que trust* and trustee.

But it may be said that the gift of \$1,000 in 1865, with interest from the death of the testator, will not satisfy the demands of a trust of \$1,000, created two years or more before. Truly not; but it does not fail, any the less, to establish the relation of the parties. And, speaking with reference to this natural and logical criticism, I remark that the will is to be read as a whole; and so reading it, it is seen that while the \$1,000 stands as before, the annuity, which in the first will was \$120, is in the second increased to \$180.

I conclude, therefore, that the relation of *cestui que trust* and trustee was established. The next question is—Was the obligation created by that relation discharged by the trustee in his lifetime, except as provided in his last will; or, if not discharged by him, was it released by Mrs. Rusling? It is important to observe that the trustee was the husband of the *cestui que trust*. This being the case, nothing short of clear and satisfactory proof will convince the court that the obligation has either been discharged or forgiven. I feel it my duty to say that ordinary expressions, importing a gift, or satisfaction, or discharge, provoked or called forth by dissatisfied members of the household, are wholly insufficient to justify the court in pronouncing judgment in favor of the trustee.

The fact that about ten years after the advance of \$1,000 to Mr. Rusling, Mrs. Rusling borrowed of him about \$900, to use in building herself a cottage, and soon thereafter paid it back to him, is, in the law, of much more significance. Ordinarily, under such circumstances, the creditor would require the debtor to account for the money already due, with interest, rather than become himself the debtor by borrowing. But, as stated above, it cannot be forgotten that Mrs. Rusling was

the wife, and however greatly the law has extended to her the privilege of asserting and maintaining her own rights in her separate estate, nothing is more certain or better known than that in multitudes of instances the married woman confides and trusts the management of her affairs absolutely to the husband. With this view of the case before me, I cannot conclude that the obligation resting upon Mr. Rusling as trustee was, by that transaction of borrowing and repaying, discharged.

During the progress of the cause, it was insisted that the statute of limitations was a bar. If I am right in my conclusions, this view cannot prevail, since it has been declared many times that the statute is not a bar to trusts of this character. Besides this view, it may safely be said that Mr. Rusling not only stood in the relation of trustee, but also that of *bailee*; for he took this money to hold or to invest for Mrs. Rusling, and to pay her the interest; it not appearing that any stipulation was made as to the length of time he should hold it. Nor does it appear that she ever made demand for the money. I cannot conclude, therefore, that the statute has any application to this case. (See *Boughton v. Flint*, 74 N. Y. 476, 481, 482.)

I am brought now to the declarations of Mrs. Rusling, made long after she placed the money in the hands of Mr. Rusling, made five or six years after she borrowed the \$900 of him, which she repaid without requiring him to account for the \$1,000 and nine or ten years' interest then due thereon, and made three or four years after the execution of the last will of Mr. Rusling. Mrs. Rusling is a most highly respectable lady, and in every way worthy of credit; but it is difficult, according to the ordinary rules applicable to such cases, to disbelieve the other witnesses, and for the court to say that two, who appear to be truthful and to be disinterested, are less worthy of credit than one, who is much more advanced in years, and whose recollection would be much more likely to be influenced or clouded by her interest. I must, therefore, conclude that Mrs. Rusling said that she had given the \$1,000 to her husband for the sake of peace.

In so deciding, I do not forget that one of the witnesses produced by the defendants said that Mrs. Rusling told her that she had given Mr. Rusling \$1,000 to put out at interest for her. But it cannot be overlooked, as stated above, that two other witnesses very distinctly stated that Mrs. Rusling told them repeatedly that she had given Mr. Rusling the \$1,000 for the sake of peace.

But whether, as between husband and wife, this ought to be regarded as sufficient to discharge the husband from his trust, under the circumstances, is not clear to my mind, nor will I now pause to determine it, because of another view of the case, which must necessarily be considered. Mr. Rusling not only recognized this claim in his first will, but, as I understand the testimony, distinctly did so to two of the witnesses between the years 1870 and 1876. And, in my judgment, although he did not name this particular sum, he recognized some claim of Mrs. Rusling against him, in his three last wills—one made in October, 1873, one in December, 1874, and the one which was proved in January, 1875—in each of which he directed that the bequests in favor of his wife should be in lieu of, and in bar of her right of dower, or any other claim that she might have against his estate. The bequests referred to were the \$2,000, payable one year after his death, with interest, and the interest on \$4,000, payable during her lifetime. The testator declares these to be in lieu of dower, which all understand to have a certain definite meaning and application, and also in lieu of any other claim, which certainly must be understood as referring to something in the mind of the testator besides dower. It was aimed at an object. It was not an idle, careless, meaningless expression, interjected at random. The court cannot disregard it. If it be possible, every word and phrase must be assigned to some purpose. And the fact appearing that Mrs. Rusling once had this just claim, and there being no certain proof that it was ever satisfied or extinguished, the expression in the will "or any other claim," will be applied to it; the court will say that the testator thereby intended to recognize this claim. I cannot escape the conclusion that some indebtedness must have existed and been recognized by the

testator, which awakened in his mind and called forth this expression, just as certainly so as her right of dower prompted him to expressly provide and guard against her making claim therefor and also taking the legacies.

But the question remains, Did Mr. Rusling intend, by the gifts made, to discharge this claim? Both as to the general rule of law in such cases, and the exceptions thereto, there is no controversy. The general rule is stated to be that a legacy will be presumed to be in satisfaction of a demand against the testator. Circumstances may arise, or facts may appear on the face of the will, showing a different intention. The intention of the testator is to govern. (*Van Riper v. Van Riper*, 1 Gr. Ch. 1, 3, and cases there cited.) A devise of land cannot be taken in satisfaction of a debt. If the testator declares that all his debts and legacies shall be paid, it is regarded as sufficient to overcome the presumption that he intended a legacy to be in satisfaction of a debt due from him. The presumption is likewise overcome, if the amount of the legacy be less than the debt, or, if the debt be unliquidated, or the legacy be not given to the creditor, but to a third person. (See *Van Riper v. Van Riper's Exrs.*, *supra*; *Reynolds v. Robinson*, 82 N. Y. 103; *Boughton v. Flint*, 74 N. Y. 476; *Chancey's Case*, 1 P. Wms. 408; and note at the end of the case found in 13 Eng. Ch. 118.) In *Phillips v. McCombs* (53 N. Y. 494) it was said "the debt being due and the legacy being payable two years after the testator's death, no legal presumption arises, upon the face of the will, that the legacy was intended as a payment of the debt." Now, what appears upon the face of this will to guide me in this matter? The testator does not say that all of "my just debts and legacies shall be paid," but says, "all my just debts, if any I have." The \$2,000 given was payable in one year after the testator's death. These expressions, and the one above quoted declaring that the bequest and the annuity should be in lieu and in bar of dower or *any other claim*, are the only expressions which can aid me in ascertaining the intention of the testator, under the rules above presented. The \$2,000 given was considerably in excess of the amount of principal and interest due at the date of the will, and also at the

death of the testator, from which time the legacy drew interest, because of which it became impossible for the debt and interest to be equal to the legacy. This, I think, takes the case out of the rule laid down in *Phillips v. McCombs (supra)*. And it seems to me that the direction that the bequests in favor of his wife shall be in lieu of dower or any other claim, takes it out of the rule established, in many of the cases, that where the testator directs that all of his debts shall be paid, the presumption is that it was not his intention that a legacy should be in satisfaction of a debt, and gives to the defendants in this case the benefit of the general rule. It seems to me it would not have been stronger if the testator had said that the bequests made to her were intended to "be in payment and discharge of any and every debt, claim or demand that she now has against me." It will strike the mind of every one that this case is not within the exception to the general rule which provides that when the testator says that his debts and *legacies* shall be paid, for, in this case, he only directs that his debts be paid, if any he have. (*Edmunds v. Low*, 3 K. & J. 318, 321; Lead. Cas. Eq. 777.) In this work I have found a more complete and useful analysis of the whole subject than elsewhere. (See Id. pp. 774, &c., 820, &c.)

I conclude that the testator was indebted to Mrs. Rusling at the time of making his last will, and that by his bequest therein of \$2,000 he intended to satisfy and discharge such indebtedness. And the creditor, Mrs. Rusling, having accepted such bequest, she was not justified in filing her bill to enforce her claim. The bill must therefore be dismissed, with costs. I will so advise.

IN THE MATTER OF KERNOCHAN.

[104 New York, 618.]

LIFE ESTATES AND REMAINDERS.—STOCK DIVIDENDS AND CASH
DIVIDENDS.

Where a testator left to his executors certain shares of stock in trust, "to receive the rents, interest, and income," and to apply the net amounts thereof to the use of his widow during her life, with remainder over to designated beneficiaries, a dividend declared upon this stock on April 14, and made payable May 3, the testator having died April 20, was held to be principal and not income, and therefore to belong to the remaindermen and not to the tenant for life.

The life-tenant is entitled to the dividends declared after the testator's death, although made from net earnings accumulated before that event.

The option given to the stockholders to take at par certain new issues of stock or bonds does not belong to the life-tenant, but must enure to the benefit of the remaindermen.

CROSS APPEALS from a judgment of the General Term of the Supreme Court, affirming a decree of the surrogate of the County of New York. The facts are stated in the opinion.

M. W. Divine, for appellant, citing *Woodruff's Estate*, 1 Tucker, 58; *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 Id. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 Id. 103; s. c., 89 N. Y. 487; *Hyatt v. Allen*, 56 Id. 553; *Jones v. T. H. & C. R. R. Co.*, 57 Id. 186; *Clapp v. Astor*, 2 Edw. Ch. 240; *Cogswell v. Cogswell*, 2 Edw. Ch. 231, 240; *Scovel v. Rosevelt*, 5 Redf. 121; *Sproule v. Bouche*, L. R. 29 Ch. Div. 653; *Barclay v. Wainswright*, 14 Ves. 67; *Price v. Anderson*, 15 Simons, 473; *Preston v. Melville*, 16 Id. 163; *Bates v. McKinley*, 31 Beav. 280; *Clive v. Clive*, Kay, 600; *Johnson v. Johnson*, 15 Jur. 714; *Murray v. Glasse*, 17 Id. 816; *Phimbe v. Nield*, 6 Id. (N. S.) 529; *Ware v. McCandish*, 10 Leigh, 595; *Read v. Head*, 6 Allen, 174; *McClaren v. Stainton*, 3 DeG. F. & J. 202; *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Id. 184; *Witts v. Steere*, 13 Id. 363; 2 Perry on Trusts, 3d ed. § 544; *Minot v. Paine*, 99 Mass.

108; *Daland v. Williams*, 101 Id. 573; *Leland v. Hayden*, 102 Id. 550; *Heard v. Eldridge*, 109 Id. 258; *Gifford v. Thompson*, 125 Id. 478; *Wiltbaugh's Appeal*, 64 Pa. St. 256; *Earp's Appeal*, 28 Id. 368; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Lord v. Brooks*, 52 N. H. 72; *Pierce v. Burroughs*, 58 Id. 302; *In re Brown*, 14 R. I. 371; *Phelps v. F. & M. Bk.*, 26 Conn. 272; *Vail v. Vail*, 49 Id. 52; *Brinley v. Grou*, 50 Id. 75; *Brundage v. Brundage*, 65 Barb. 397; *Granger v. Bassett*, 98 Mass. 462; *Perry on Trustees*, 87, § 545; *Atkins v. Albree*, 12 Allen, 359; *Gray v. Portland Bk.*, 3 Mass. 364; *In re Hopkin's Trusts*, L. R. 18 Eq. Cas. 696; 1 Phillips on Ev., 402, chap. 8, § 10; Code Civ. Pro., § 2736; *Betts v. Betts*, 4 Abb. N. C. 437; *In re Vanness*, 1 Tucker, 180; *Eager v. Roberts*, 2 Redf. 247; *In re Pike*, Id. 255.

J. Frederic Kernochan, for respondents, citing *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 178; *Hyatt v. Allen*, 56 N. Y. 553; *Hill v. Newichawanick Co.*, 8 Hun, 459; 71 N. Y. 593; *Minot v. Paine*, 99 Mass. 108; *Daland v. Williams*, 101 Id. 571; *Leland v. Hayden*, 102 Id. 542; *Heard v. Eldridge*, 109 Id. 258; *Gifford v. Thomas*, 115 Id. 478; *Sproule v. Bouche*, 29 Eng. L. R. Ch. Div. 635; 1 Phillips on Ev., chap. 5, § 4, pp. 100, 101; *Shear v. Van Dyke*, 10 Hun, 528; *Gillespie v. Brooks*, 2 Redf. 349; *Wood v. Tunncliffe*, 74 N. Y. 38.

William Jay, for respondents, citing *Hyatt v. Allen*, 56 N. Y. 553; *Hill v. Newichawanick Co.*, 8 Hun, 459; affirmed, 71 N. Y. 593; *Goldsmith v. Smith*, 25 Hun, 201; *Atkins v. Albree*, 94 Mass. 359; *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157; *Moss's Appeal*, 83 Penn. St. 364; *Minot v. Paine*, *supra*; *Brinley v. Grou*, 50 Conn. 66; *Conn. v. Jackson*, 1 Johns. Ch. 13; *Young v. Hill*, 67 N. Y. 162; *Ackerman v. Emott*, 4 Barb. 626; *Lansing v. Lansing*, 45 Id. 182; *Smith v. Velie*, 60 N. Y. 106; *Secor v. Sentis*, 5 Redf. 570; *In re Gerard*, 1 Dem. 244.

Edward S. Dakin, for respondents, citing *Young v. Hill*, 67 N. Y. 162; *State of Conn. v. Jackson*, 1 John. Ch. 13; *Se-*

cor v. Sentis, 5 Redf. 570; *In re Gerard*, 1 Dem. 244; *Hill v. Newichawanick Co.*, 8 Hun, 459; 71 N. Y. 593; *Sproule v. Bouche*, 52 L. T. N. S. 366; *Minot v. Paine*, *supra*; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Id. 542; *Brinley v. Grou*, 50 Conn. 66; *Van Doren v. Alden*, 19 N. J. Eq. 117; *Atkins v. Albree*, 12 Allen, 359.

DANFORTH, J. This is an appeal from a judgment of the Supreme Court, affirming a decree of the surrogate of the county of New York, on a judicial settlement of the account of the executors of John R. Marshall, deceased. The account was objected to by several of the parties interested, and with the objections, sent to a referee to hear and determine. Upon the coming in of his report, it was in substance confirmed by the surrogate, and upon appeal to the General Term, his decision was affirmed. All parties claim under the will of Mr. Marshall, and the principal questions now raised concern the rights of the donee for life and the remaindermen, and depend for an answer upon the true construction of that provision of the will which empowers the executors "to receive the rents, interest, and income" of so much of the estate as was given to them in trust, to apply the net amounts of such rents or income to the use of the widow of the testator during her life, and after her death to divide the remaining estate among his surviving daughters and the issue, if any, of such as may have died.

Among the items of personal property left by the testator was one of 5,000 shares of the capital stock of the Panama Railroad Company. This was inventoried by the executors at \$100 per share, as its par value, and \$275 as its market value, and \$1,375,000 as its assessed value. On the 14th of April, 1881, a dividend of \$25,000 (No. 90) was declared upon this stock, payable May 2, 1881. The testator died during the night of April 20, at ten minutes past eleven o'clock. The executors treated this dividend as principal, and charged themselves with it in these words: "Panama dividend declared April 14, 1881, books closed for transfer April 20, 1881, 2 p. m., and payable May 2, 1881." Mrs. Marshall, the widow and

executrix of the testator, objected to this in both characters, alleging "that no such amount as the said sum of \$25,000 formed any part of the estate of John R. Marshall at the time of his death, and that said statement and item, and said amount of \$25,000, should be stricken from said inventory and from said account," and added to the items of income, and as such received by the executors.

The decision of the surrogate was against her contention, and, we think, properly. As soon as the profits on shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial. The dividend to which the life-tenant may be entitled as income, can only be that which the company declares after that relation is acquired. In this case the dividend represented profits, or income, but had become a debt before the will took effect. Mrs. Marshall was entitled to income merely.

In *Cogswell v. Cogswell* (2 Edwds. Ch. 231), cited by the appellant, the testator directed that his wife be permitted "to take the interest or dividends" on certain stock, and the question submitted was "as to the time from which she would be entitled to dividends," and the Vice-Chancellor said from the death of the testator; "that is to say," he adds, "the dividends which may accrue, or be declared, or become payable at any time after" that event. The terms of the will and the question were unlike those before us. The will in one case gives income or profits, in the other dividends, that is the share of income or profits already ascertained and declared. The first gives that to which the testator had no legal title. The other might include that of which he became the legal owner on the day when the dividend was declared, although it remained unpaid. (*Hyatt v. Allen*, 56 N. Y. 553; *Hill v. Newichawanick Co.*, 8 Hun, 459, affirmed in 71 N. Y. 593.)

Second. It is stated in the account that the 5,000 shares of Panama railroad stock were sold to the Panama Canal Company for \$265.74 $\frac{1}{2}$ per share, making \$1,328,714.32. The life-tenant objected to the account in this respect, alleging that in

fact the stock was sold at \$250 per share only, and not \$265.74 $\frac{1}{2}$, as in the account stated. The facts, so far as they are deemed material in presenting this question, and as found by the referee, show that prior to the death of the testator, the Panama Railroad Company had not only earned and paid dividends, but had accumulated securities, money, and other assets from earnings over and above expenses and dividends, and on the 10th of June, 1881, had on hand \$1,102,000 as a sinking fund for the redemption of outstanding obligations. On the day last named an agreement was entered into between certain stockholders of the railroad company and the Universal Inter-Oceanic Canal Association for the sale of their stock to the canal association for \$250 for each share, and also providing that the canal company should have the sinking fund, but that the stockholders should be paid by the canal company a sum equal to a ratable proportion of the \$1,102,000 sinking fund above-named, which was equivalent to \$15.74 per share of the capital stock. This makes the sum of \$78,714.34, and in the account of the executors is merged in the price at which the stock was sold the canal company and credited to principal. This disposition was sustained by the referee and surrogate, the life-tenant excepting thereto and claiming it should have been carried to income. We think the exception cannot stand. The money was not paid as a dividend, nor was it distributed among stockholders, but only to such as sold their shares to the new company—the canal association. Indeed, as stockholder, no one received any part of it. It was paid as a price to the seller. The Panama Railroad Company was not dissolved, and its stockholders who did not sell have continued to receive dividends, and the canal company which purchased the shares once owned by the testator have received in like manner dividends on the shares so purchased. Had the shares been retained by the executors, the money in question would not have been received by them. It is true that the sale in effect carried with it the interest which each shareholder, as a member of the company, had in the sinking fund, so that the new shareholder was substituted for the old. The fund was the accumulation of profits, and may properly be regarded as

part of the capital of the company. But it still remained pledged for the bonds, for the payment of which it was created, and its possible value only enhanced the value of the shares. The price paid for the shares, although increased by this prospective advantage, belonged altogether to the remaindermen, and was properly carried to principal and not income.

Third. It was also provided in the same agreement of June tenth, that all earnings of the railroad company to and including June, 1881, and all moneys and other effects not by that agreement to be left with the railroad company, should be transferred by the railroad company to a trustee "for the benefit of all the existing stockholders," and belong to, and be divided among the shareholders "who are such at the time of the declaration of such dividend" or transfer of the railroad company.

This was not carried out, but before June thirtieth, the assets so referred to were sold and transferred by the railroad company to a syndicate for the sum of \$1,698,200, and this was paid to the railroad company June 30, 1881. It amounted to \$24.26 on each share of the capital stock of the railroad company, and on the same day the railroad company, on the report of its treasurer that the amount of funds on hand "subject to distribution, was sufficient to authorize a dividend of \$24.26 upon each share of the capital stock of the company," adopted the following resolution:

"Resolved, That a dividend of twenty-four dollars and twenty-six cents (\$24.26) on each share of the capital stock of this company be, and the same is, hereby declared, payable on and after Monday, the first day of August next, to the stockholders of record, or their legal representatives. That the books of transfer be closed on the afternoon of the thirtieth instant, and be reopened on the morning of the 2d of August, 1881." This dividend was numbered "91" in regular order, and was payable and paid at the time the usual quarterly dividends were paid. It appeared also that the assets which formed the consideration of the payment by the syndicate, were accumulated net earnings, represented by cash or securi-

ties calling for cash. The executors credited to income the above amount of \$24.26 per share, making \$121,300. It was objected, in behalf of the remaindermen, that the credit to income was wrong, and that the sum of \$121,300 should have gone into the principal of the estate. The referee finds and reports that of this sum only \$22,442.85 should be regarded as income belonging to the life-tenant, and the residue, \$98,857.15, should be regarded as a portion of the *corpus* of the estate. To so much of this finding as apports any part to principal, exception was taken in behalf of the life-tenant.

The referee made the apportionment in question by ascertaining how much was earned before and how much after the death of the testator, and so doing applied a rule which may be founded on general equity, viz.: that when a fund is given for life to one beneficiary, and remainder over, the first shall have its earnings after his life-tenancy begins, and the remainderman the balance. I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule, which gives cash dividends declared from accumulated earnings or profits to the life-tenant, should be applied. The direction to his executors is to receive the rents, interest, and income of his estate, and apply the net amount of such rents or other income (with certain exceptions not now material) to the use of his wife. From the shares in question no income could accrue, no profits arise to the holder until ascertained and declared by the company and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise. This was held in *Clapp v. Astor* (2 Edwds. Ch. 379), in construing a contract relating to "net profits or dividends," and by this court in *Hyatt v. Allen* (56 N. Y. 553); the principle stated was said to be founded in good sense and applied in construing an agreement made August 11, 1871, which provided that "all profits and dividends of and upon" certain "stock," up to the 1st of Janu-

ary, 1872, should be paid to defendant. No dividends were declared, or distribution of profits made prior to that time, but in April, 1872, a dividend of \$15 per share was declared and was received by defendant. Plaintiff sued to recover it, and a referee found that \$250 of this dividend was earned between August 11, 1871, and July 1, 1872, and gave judgment for that amount. This court reversed the judgment, saying there were profits earned by the corporation up to January 1, 1872, but they were not the profits of the stockholders in any legitimate sense. "There were no profits accruing to the stockholders until they were set apart by the corporation for their use." The same principle is to be applied in determining the relative rights of a tenant for life and a remainderman. Payments in respect of profits accruing and properly divisible as such are income, and belong to the tenant for life, if the sum payable is ascertained and declared after the testator's death.

In *In re Hopkin's Trust* (L. R. 18 Eq. 696), a holder of shares bequeathed his personal estate to trustees, in trust, to permit his wife to receive the dividends, interest, and income thereof for her life, remainder over. He died in December, 1870. In January, 1873, an extraordinary dividend was declared on part of the shares for five years previously, and in July, 1873, a special dividend was declared on others for the half year previous. It was held that the life-tenant was entitled to both; that although the company might have capitalized the earnings, they, by resolution, treated the money as dividend and not capital, and their decision was conclusive. The same effect was given to the determination of the company in characterizing its earnings in *Barton's Trust* (L. R. 5 Eq. 238, 245); and the rule is a reasonable and proper one, which limits the right of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient, and it would lead to great embarrassment and confusion if a court should under-

take to interfere with their discretion so long as they do not go beyond the scope of their powers and authority.

In this case no portion of the earnings which entered into the dividend had been capitalized by the company, and, therefore, the inquiry when the profits were earned, out of which it was to be paid, was immaterial. It is not claimed that the declaration of the dividend, as dividend from profits, was *ultra vires*, and whenever earned they were not profits until the directors so declared. In *Hyatt v. Allen* (*supra*), it was thought by the learned judge, who spoke for the court, that "a gift of the profits and dividends of stock for life would not be held to carry dividends declared after the death of the beneficiary, although made from profits accrued during his life," making the act of the company conclusive, and giving the earnings to the time of the declaration of the dividend. *Sproule v. Bouche* (L. R. 29 Ch. Div. 635, 653) sustains this view. "The general principle applicable to these inquiries may, in our opinion," say the court in that case, "be thus stated: When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company, which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him (the testator or settlor) in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital." I think, therefore, the executors properly carried the whole of this dividend (91) to income, that the referee and surrogate erred in making an apportionment, and, therefore, that the exception of the life-tenant should prevail.

Fourth. The executors classed as income certain options or privileges given by various companies in 1881, to subscribe for stocks and bonds, in all of the value of \$44,478. This was

objected to by the remaindermen, and the objection sustained by the referee and surrogate.

The privilege or option was to subscribe for, and take at par one or more bonds or shares of stock for a certain number of shares of stock already held by the estate. The right to subscribe belonged to the trust estate, and accrued upon condition the estate chose to pay for or purchase the bonds or stock. If the option was accepted, the purchase operated to increase the capital or change its manner of investment, and if not accepted, the life-tenant could neither complain of the choice of the trustees, nor in any way control their discretion. We think its value did not belong to her, and that the decisions of the referee and surrogate in regard thereto were correct.

Fifth. The guardian of Marie Marshall (a person of unsound mind), and the guardians for Kernochan (an infant) also appeal against, first, allowance of compound interest on moneys found due to Mrs. Marshall from the testator; second, commissions to Mrs. Marshall. First. Both referee and surrogate were against the objectors as to the first. As to the second, the referee sustained the objection, but the surrogate overruled it, and allowed \$15,000 to Mrs. Marshall as commissions. As to the first, the testator had the principal moneys in hand for the purpose of investment and reinvestment, but mingled them with his own funds. It was not improper, therefore, under the circumstances of this case, to charge him with interest upon interest, as if received in the usual manner, for he forebore investment and used the moneys for his own convenience.

As to commissions: The referee found that Mrs. Marshall "duly qualified as executrix of the last will and testament of John R. Marshall, deceased, on the 8th day of October, 1881, and has been at all times since that date ready and willing to take part, and has taken part in the management of the estate."

The objection raised in behalf of the remaindermen hangs upon the request of the testator contained in the will, in these words: "It is also my request that all persons herein named

as executors will consent to act as such executors and trustees, and that each executor and trustee, other than my wife, do also receive and take the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to the duties herein devolved upon them." We think the intention of the testator was to exclude his wife from compensation. Substantially the whole income of the estate, the result of the management of the executors, of whom she was one, is given to her, and it cannot be supposed that he intended she should also be paid for caring for it.

The decree of the surrogate and judgment of the Supreme Court should be modified according to the above opinion, and, as so modified, affirmed without costs in this court to either party.

RUGER, Ch. J., RAPALLO and FINCH, JJ., concur; EARL, J., concurs except as to allowance of compound interest, and as to that item he dissents; ANDREWS, J., dissents as to the \$24.26 a share on the ground that it was in substance a closing out of the sale of the stock and a distribution of capital.

Judgment in accordance with opinion.

Life Estates and Remainders in Shares of Stock.—An ordinary or regular cash dividend, declared during the continuance of the life estate, belongs to the life-tenant. It is income and not capital. Upon this question the cases are uniform: *Barclay v. Wainewright*, 14 Ves. 66; *Clive v. Clive*, Kay, 600; *Norris v. Harrison*, 2 Madd. 268; *Preston v. Melville*, 16 Sim. 163; *Cuming v. Boswell*, 2 Jur. (N. S.) 1005; *Murray v. Glasse*, 17 Jur. 816; *Ware v. McCandish*, 11 Leigh (Va.), 595.

As to such dividends, it is not material when they were earned. If they were declared during the continuance of the particular estate, they go to the life-tenant. *De Gendre v. Kent*, L. R. 4 Eq. 263; *Browne v. Collins*, L. R. 12 Eq. 586; *Locke v. Venables*, 27 Beav. 598; *Cogswell v. Cogswell*, 2 Edw. Chan. 281; *Price v. Anderson*, 15 Sim. 473; *Barclay v. Wainewright*, 14 Ves. 66; *Witt v. Steere*, 13 Ves. 263; *Abercrombie v. Riddle*, 8 Md. Chan. 320; *Wright v. Tuckett*, 1 John. & Hem. 266; *Richardson v. Richardson*, 73 Me. 570; s. c., 4 Am. Prob. Rep. 352; *Furley v. Hydes*, 42 L. J. Chan. 626; *Bates v. MacKinley*, 31 Beav. 280; *Jones*

v. Ogle, L. R. 8 Chan. 192; Goldsmith v. Swift, 25 Hun, 201; Johnson v. Bridgewater Manfg. Co., 14 Gray, 274; Jermain v. Lake Shore, &c. R. R. Co., 91 N. Y. 488; Gifford v. Thompson, 115 Mass. 478; Ellis v. Proprietors, &c., 2 Pick. 248.

The English Rule.—In England the courts distinguish between ordinary or regular, and extraordinary or extra dividends, the former going to the life-tenant and the latter to the remainderman. Witt v. Steere, 18 Ves. 363; Norris v. Harrison, 2 Madd. 268; Hooper v. Rossiter, McClelland, 527; Bates v. MacKinley, 31 Beav. 280; Paris v. Paris, 10 Ves. 185 (by Chan. Eldon); Brander v. Brander, 4 Ves. 800; Barclay v. Wainwright, 14 Ves. 66; Price v. Anderson, 15 Sim. 473; Irving v. Houstoun, 4 Paton's H. of L. Cas. 521; *In re* Barton's Trust, L. R. 5 Eq. 238; Clayton v. Gresham, 10 Ves. 288; Gill v. Burley, 22 Beav. 619; Straker v. Wilson, L. R. 6 Chan. 508; Plumbe v. Neild, 6 Jur. (N. S.) 529; Johnson v. Johnson, 15 Jur. 714; *In re* Hopkins' Trust, L. R. 18 Eq. 696; Sproule v. Bouche, L. R. 29 Chan. Div. 685 (reversed in the House of Lords; see 2 Ry. & Corp. L. J. 69); Locke v. Venables, 27 Beav. 598; Scholefield v. Redfern, 32 L. J. Chan. 627.

The "Rule in Minot's Case."—In Massachusetts a rule upon this subject, which is known as the rule in Minot's case, prevails. It is thus formulated in the opinion of the Supreme Judicial Court in the leading case: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." Minot v. Paine, 99 Mass. 101. The later cases are to the same effect: Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Id. 542; Heard v. Eldridge, 109 Id. 258; Rand v. Hubbell, 115 Id. 461; Gifford v. Thompson, 115 Id. 478; Hemenway v. Hemenway, 134 Id. 446; s. c., 8 Am. Prob. Rep. 429, and the note 436; New England Trust Co. v. Eaton, 140 Mass. 582; s. c., 4 Am. Prob. Rep. 368.

See also the following earlier cases which seem to have led up to the rule: Harvard College v. Amory, 9 Pick. 446; Balch v. Hallet, 10 Gray, 402; Atkins v. Albree, 94 Mass. 859. *Cf.* Reed v. Heard, 6 Allen, 174; Lovell v. Minot, 20 Pick. 116; Parsons v. Winslow, 16 Mass. 361; Bowker v. Pierce, 180 Id. 262; Dodd v. Winship, 138 Id. 359; Wright v. White, 136 Id. 470.

The Massachusetts rule is followed in Rhode Island. Parker v. Mason, 8 R. I. 427; Busbee v. Freeman, 11 Id. 149; Petition of Brown, 14 Id. 371, and, somewhat tentatively, in the District of Columbia; Gibbons v. Mahon, 4 Mack. 130. But the opinion in this case is confused.

It was also incorporated into the civil code of Georgia, and is the rule in that State. Code of Georgia, § 2256; Millen v. Guerrard, 67 Ga. 284.

This rule has in general found little favor. It has been savagely criti-

cised in many jurisdictions, and it is submitted upon the soundest grounds. See 3 Am. Prob. Rep. 436, n.

The General American Rule.—This rule, says Mr. Cook in his work on "Stock and Stockholders," § 554, "proceeds upon the theory that the court, in disposing of stock or property dividends, as between life-tenant and remainderman, may properly inquire as to the time when the fund out of which the extraordinary dividend is to be paid was earned or accumulated. If it is found to have accrued or been earned before the life estate arose, it is held to be principal and to belong to the *corpus* of the estate, and not to go to the life-tenant, without reference to the time when it is declared or made payable. In this way it enures to the benefit of the remainderman's estate. But when it is found that the fund out of which the dividend is paid accrued or was earned, not before but after the life estate arose, then it is held that the dividend is income, and belongs to the tenant for life."

The rule was first announced in Pennsylvania, and hence is sometimes called the Pennsylvania rule. *Earp's Appeal*, 28 Penn. St. 368; *Wiltbank's Appeal*, 64 Id. 256; *Moss's Appeal*, 88 Id. 264; *Biddle's Appeal*, 99 Id. 278; s. c., 3 Am. Prob. Rep. 442; *Vinton's Appeal*, 99 Id. 484; s. c., 3 Am. Prob. Rep. 281; *In re Thompson's Estate*, 11 Week. Notes Cas. 482. See also *Robert's Appeal*, 92 Penn. St. 407; *Thomson's Appeal*, 89 Id. 86.

This is also the rule in New Jersey. *Van Doren v. Olden*, 19 N. J. Eq. 176; *Ashurst v. Field's Adm'r*, 26 Id. 1.

New Hampshire. *Lord v. Brooks*, 52 N. H. 72; *Wheeler v. Perry*, 18 Id. 807. *Cf. Pierce v. Burroughs*, 58 Id. 802.

And Maine. *Richardson v. Richardson*, 75 Me. 570; s. c., 4 Am. Prob. Rep. 352.

OUTCALT vs. OUTCALT.

[42 New Jersey Equity, 500.]

CONSTRUCTION OF A RESIDUARY CLAUSE.—GIFT TO ISSUE.

Under a testamentary direction that after the death of the testator's wife the residue of his estate "shall be divided among my several children, share and share alike; and in the event of any of my said children dying before my said wife, and leaving issue them surviving, then such issue shall be entitled to and

receive their parent's share, the same as said parent would receive, were he or she then living," the children of a son who died in testator's lifetime, and before the making of the will, and before the death of the widow, were held entitled to their father's share.

BILL for construction of will.

Woodbridge Strong & Sons, for complainant.

THE CHANCELLOR. The bill is filed for a construction of the residuary clause of the will of Jacob H. Outcalt, deceased. The clause is as follows :

"I do further order and direct that after the decease of my said wife, Mary, all her just debts and funeral expenses shall be first paid out of my remaining estate, and the residue thereof shall be divided among my several children, share and share alike; and in the event of any of my said children dying before my said wife and leaving issue them surviving, then such issue shall be entitled to and receive their parent's share, the same as said parent would receive were he or she then living."

The testator left five children. He had also two grandchildren—the children of a son who died in the testator's lifetime, and before the making of the will. His widow (whom he appointed sole executrix) is dead, and this suit is brought by his administrators *de bonis non cum testamento annexo*. The question is whether those grandchildren are entitled to share in the distribution of the residue under the residuary clause of the will. The direction is to divide among the testator's several children, and in the event of any of his "said children" dying before his wife, and leaving issue surviving, the issue are to take the share which the parent would have taken if living at the widow's death. There is no evidence in the will that the testator intended to exclude the children of his deceased son. The gift is, indeed, to the testator's several children, and is followed by the provision that, "in the event of any of his 'said' children dying before his wife, leaving issue, such issue shall take in the parent's stead." But this gift to his children and to the issue of his "said" children

does not exclude the children of the deceased son. By the language which he used, the testator intended to make a gift to his children who should survive his wife, and to the issue (*per stirpes*) of any that should be dead at the time of her decease. The children of the deceased son are within the terms of the will. Their father died before the widow. By the expression, "my several children," the testator referred to all his children, living and dead, as a class. By the word "several" he probably meant "all." It may be added that it is reasonable to presume that if he had intended to exclude the issue of his deceased son he would have said so plainly. Such gifts have frequently been construed as admitting the issue of a person who died in the testator's lifetime to a participation in the gift. In *Potter's Trust*, (L. R.) 8 Eq. 52 (V. C. Malins, 1869), the testator bequeathed his residuary estate and effects to trustees to pay the income to certain persons for their lives; and, subject thereto, bequeathed one-fourth of his estate and effects to his nephews and nieces, the children of his late sister, Mary Lamb, in equal shares and proportions, as tenants in common, and not as joint tenants, and added:

"And in case of the death of any of my said nephews and nieces, leaving issue, then I direct that such issue shall take the share that his, her or their deceased parents would have taken, if living."

It was held that the children of nephews and nieces who died before the date of the will, and of a nephew who died after the date of the will, but before the testator, took, by substitution, the shares which their respective parents would have taken, if living at the testator's death. In *Adams v. Adams* (L. R. 14 Eq. 246 [1872]), a provision that should any of the brothers or sisters of the testator die leaving issue during the lifetime of his sister, Susan Adams (to whom he gave all his property for life, with remainder to his other brothers and sisters equally), the share that would have been theirs should be equally divided among their children, was held by the same judge to permit the children of a brother, who died fifteen years before the testator, to take a share of the estate. In

Cort v. Winder (1 Collyer, 321), the gift was to a class (cousins german) living at the testator's death, with provision that in the event of the death of any of them before their respective shares should become due or payable, leaving lawful issue, to such issue, it was held that the issue of a cousin, who died in the testator's lifetime, was entitled to take the prospective share of the parent. In *Chapman's Will* (32 Beav. 382), where there was a bequest of a legacy to such of certain persons (the testator's nephews and nieces, children of his late sister, and others whom he specified) as should be living at his death, equally, with provision that in case any of them should die in his lifetime, leaving any child or children who should be living at his decease, and who should then have attained or should live to attain the age of twenty-one years, such child or children should stand in their parent's place, and be entitled to the same share or shares and interest as the deceased parents would have been entitled to if living at the time of the testator's death—it was held (by Sir John Romilly, M. R.) that the child of a niece who had died prior to the date of the will was entitled to participate in the legacy; that the words, "shall die in my lifetime," were not to be construed as signifying death in the testator's lifetime after the making of the will, but death before the testator's decease, whether happening before or after the making of the will; that is, they were held to be equivalent to the expression, "shall be dead at the time of my death."

In *Sibley's Trusts* (L. R. 5 Ch. Div. 494), where the gift was in trust for "all and every the children of Robert Fuller, or their issue, in equal shares," it was held (by Sir George Jessel, M. R.) that the issue of four deceased children who were dead at the date of the will were entitled to shares as issue of their deceased ancestors. In *Long v. Labor* (8 Pa. St. 229) the testator having given legacies of nearly equal value to his children and the children of his deceased children, directed a sale of his real estate after the death of his widow, and that the residue of his estate, after paying legacies, should be equally divided among his children who should be living at the time of such distribution, and that in case any of them

should be deceased, their heirs should receive in equal parts such share as their parents would be entitled to receive if living. It was held (upon the whole will, however), that the issue of a child who died before the date of the will were entitled to participate in the residue with the children who survived the period for distribution. In *May's Appeal* (41 Pa. St. 512), a testator by his will bequeathed the residue of his estate to his grandchildren, the children of his two daughters, to be paid to them share and share alike, as they should respectively arrive at the age of twenty-one years, and provided as follows:

"In the event of the death of any one of the said grandchildren before he or she shall arrive at the age of twenty-one years, then and in that case I order and direct my executors to pay the share of him or her so dying to the mother of the child, if living."

It was held that the mother of a grandchild who had died in the testator's lifetime was entitled to an equal share with the other grandchildren. In *Potter's Trust*, and *Adams v. Adams*, Vice-Chancellor Malins, criticising *Christopherson v. Naylor* (1 Meriv. 320), places the decision upon a principle which he lays down as that which he thinks would put the law upon the subject on the most rational footing, viz.: Wherever there is a gift to a class, with a gift by substitution to the issue or children of those who shall die, the children take what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will, unless a contrary intention is shown. But, in both those cases, no new rule was necessary, for there was an independent gift to the issue. It is laid down by Mr. Theobald that if the original gift is to a class, with a direction that the issue of any dying in the testator's lifetime or before the period of distribution, shall take the share their parents would have been entitled to if then living, the issue of those dead, at the date of the will, will be admitted, as the direction amounts to an independent gift—the word "share" being satisfied by a stirpi-

tal distribution. (Theob. Wills, 348. See, also, Hawk. Wills, 249.)

In the case under consideration, the gift to the issue is an independent gift. There will be a decree advising the administrators that the children of Henry Outcalt, deceased, are entitled to that share of the residue to which he would have been entitled had he survived the widow.

TERRY vs. SMITH.

[42 New Jersey Equity, 504.]

CONSTRUCTION OF A RESIDUARY CLAUSE.—TRUST FOR THE EXECUTION OF A WILL.

A testatrix, after directing the payment of her debts and funeral expenses, gave to one of her daughters the interest of one equal undivided sixth part of all her estate for life, with remainder over, and made the same bequest to complainant. She then gave two pecuniary legacies, and then gave all the rest of her estate to her executor "in trust for the execution of her will," and gave to another daughter the income of such residue for life, with remainder over. The personal estate is \$700, the real, \$42,000, and the debts about \$14,000: *Held*, (1) that complainant's share, although evidently given in trust, is not subject to the trust of the residue, and consists of one-sixth of the whole estate, after the payments of the debts and expenses, for which the court may appoint a trustee; (2) that if the real estate can be equitably divided, complainant's share thereof may be set off for her benefit, and she may enjoy it as a tenant for life, but, if not thus partible, there must be a conversion.

If the language is not doubtful, the mere fact that the reasons assigned by the testatrix for discriminating in the gifts to certain legatees are false in fact, cannot control the construction of her will, although such construction may fail to effectuate her purpose.

BILL for partition. On final hearing on pleadings.

Hawkins & Durand, for complainant.

S. Patterson and *G. C. Beekman*, for defendants.

THE CHANCELLOR. The complainant seeks partition of the land of her late mother, Harriet E. Manning, deceased, and an account of the rents and profits thereof coming to her, and an account of the personal estate of her mother, and a decree that her share thereof be invested for her benefit. She claims, under the will of her mother, a life interest in one-sixth of the whole estate. By the will the testatrix, after directing payment of her debts and funeral expenses by her executor and trustee therein named, gave and bequeathed to her daughter, Frances M. G. Wilson, "the interest of the one equal undivided one-sixth part or portion" of her whole estate, during Mrs. Wilson's natural life, and directed that upon the death of Mrs. Wilson "the said interest and principal thereof" be paid absolutely to Georgiana Sweet, a granddaughter of the testatrix. She then gave and bequeathed to her daughter, the complainant, "the interest of the one equal undivided one-sixth interest, part or portion" of the whole estate during the complainant's natural life, and directed that on the death of the complainant, "the said interest, as well as principal thereof," be paid absolutely to the before-mentioned Georgiana Sweet. She next gave a legacy of \$1,000 to her sister, Mrs. Hendrickson (which, however, she subsequently revoked by a codicil), and \$5,000 absolutely to her granddaughter, Bessie Belle Bateman, daughter of her daughter, Nellie J. Smith, on her attaining to the age of twenty-one years, and \$2,000 absolutely to Harriet L. Smith, another daughter of Mrs. Smith, upon her attaining to her majority; and she then gave and devised all the balance and residue of all her property, both real and personal, of whatever nature or kind, and wheresoever situated, to James A. Bradley, her executor, "in trust for the execution of her will," and gave to her daughter, Mrs. Smith, all the rents, issues and profits of all her estate, both real and personal, so to be held in trust, and directed the executor to pay over to her those rents, issues and profits quarterly for and during her natural life; and, upon her death, gave, bequeathed and devised all the remainder and residue of her estate, both real and personal, to Mrs. Smith's before mentioned two daughters absolutely. The value of

the personal property was, it is said, about \$700; that of the real estate about \$42,000, and the debts amounted to about \$14,200.

The gift to the complainant is of the interest of the clear one-sixth of the estate, real and personal. The scheme of the will is to give to her and Mrs. Wilson each one-sixth of the entire estate for life, with remainder to the complainant's daughter; to give to Mrs. Smith's two daughters \$7,000, and then to give the residue of the estate to the executor to pay debts and funeral and testamentary expenses, and then to pay over to Mrs. Smith, quarterly, the rents, issues and profits of the balance of the residue, and, at her death, to hand over such balance to Mrs. Smith's two daughters. The shares of the complainant and Mrs. Wilson are not subject to the trust created for the residue. The words, "for the execution of my will," are employed in the will to qualify the trust, but they are superfluous, and do not extend it over the shares of the complainant and her sister, Mrs. Wilson. The debts and the pecuniary legacies of \$5,000 and \$2,000 to Mrs. Smith's daughters, are to be paid out of the residue in exoneration of those shares. The complainant and Mrs. Wilson are each entitled to the interest of an undivided one-sixth of all of the testator's estate, real and personal, without any deduction for the payment of debts, or for the payment of the pecuniary legacies.

The trust of the residue did not devolve upon the administrator with the will annexed. (*Brush v. Young*, 4 Dutch. 237; *Lanning v. Sisters of St. Francis*, 8 Stew. Eq. 392.)

The complainant is entitled to have her share set off to her for her use. If good reason be shown for so doing, a mixed trust estate is partible in equity. (*Wetmore v. Zabriskie*, 2 Stew. Eq. 62.) It is manifest, from the language of the bequest, that the testatrix contemplated a conversion of the share into money, and the investment thereof for the benefit of the complainant for life. The gift to her is of the "interest of the equal undivided one-sixth part or portion" of the estate, and the will directs that after her death the "said interest and principal thereof" be "paid" to Georgiana

Sweet. And so, too, the gift to Mrs. Wilson is of the "interest of the one equal undivided sixth interest, part or portion" of the estate for life, with a direction that upon her death the "interest as well as the principal thereof" be "paid" to Georgiana Sweet. The testatrix, indeed, gives no express power of sale of the real estate, and, in the gift of the residue to Mrs. Smith, appears not to have contemplated the sale of the real estate therein, for she gives to her the rents, issues and profits for life, and gives, bequeaths and devises the property, after Mrs. Smith's death, to Mrs. Smith's daughters. The difference between the provision for the complainant and Mrs. Wilson and the provision for Mrs. Smith is very marked. The testatrix appoints no trustee of the shares of the complainant and Mrs. Wilson, but she evidently meant to create a trust as to those shares. In such case where such a trust is created, and no trustee is appointed, the trust would devolve upon the executor. But the executor has renounced, and refuses to act, and the administrator has no authority to execute the trust. Under such circumstances this court would appoint a trustee. If the real estate can be partitioned without prejudice to the interest of the owners, the share of the complainant may be set off, and she may enjoy it as tenant for life.

By the will the testatrix declares that her reason for bequeathing a larger share of her estate to Mrs. Smith than to the complainant and Mrs. Wilson was not for want of affection for the latter, but because they were "amply provided for in this world's goods," whereas Mrs. Smith was poor and had no property of her own whatever; and that her reason for giving more of her estate to Mrs. Smith's two daughters than to her other granddaughter, Georgiana Sweet, was that they were poor and had no property whatever, while Georgiana Sweet had ample means and property in her own right. It is urged on behalf of Mrs. Smith and her daughters that under the construction which is above put upon the will, the testatrix's intention to give to Mrs. Smith more than she gave to the complainant and Mrs. Wilson will be frustrated. But this consideration cannot control in the construction of the will,

inasmuch as the language and terms of the instrument are not doubtful. The fact that the testatrix's plan of division of her property fails to effectuate her purpose in this respect will not justify the court in disregarding the plain provisions of the will. If her design is defeated, it is because she overvalued her property, or because it has fallen in value, or because she contracted debts or met losses after the making of the will. Where the testator's language and the provisions of the will are plain the court must be guided by them.

The following note is reprinted from the New Jersey Equity Reports, Vol. 42, by the permission of JOHN H. STEWART, Esq., the reporter:

Query, whether a devise revoked because the testator says by codicil he is advised that the legacy is void in law, which is not so, is a valid revocation. *Atty.-Gen. v. Lloyd*, 1 Ves. Sr. 32; 3 Atk. 551; *James's Goods*, 19 L. T. 610; *Dunham v. Averill*, 45 Conn. 61, 77; *Armorer v. Case*, 9 La. Ann. 288; *Skipwith v. Cabell*, 19 Gratt. 758; *Arthur v. Arthur*, 10 Barb. 9.

After a devise to L., in tail, and the death of L. in testatrix's lifetime, leaving a daughter, E., of which testatrix was ignorant, she made a codicil reciting that L. had died without issue and devising L.'s estate over. *Held*, to be only a conditional revocation, and that E. was entitled. *Evans v. Evans*, 2 Perry & D. 378; 10 Ad. & E. 228.

A testator, in 1849, gave the interest of a fund to his daughter Charlotte, by her maiden name, with a gift over of the fund in case she should marry or die unmarried. She had been married in 1828, as testator knew, but her husband had not been heard of for several years prior to 1849. After testator's death he reappeared and on Charlotte's death claimed the fund as her husband. *Held*, that the gift showed that testator believed him to be dead, and that he intended that no husband of Charlotte's should have the fund. *Crothwaite v. Dean*, L. R. (5 Eq.) 249. See *Pratt v. Mathew*, 22 Beav. 328.

A testator assigned as a reason for discriminating between gifts to A. and B. that A. could, under a clause in a prior deed of part of the property from himself to A. be required to bring it into hotch-pot, which was not a fact. *Held*, that A. could not be required to elect. *Langslow v. Langslow*, 21 Beav. 552. See *Box v. Barrett*, L. R. (3 Eq.) 244.

Where £3,000 were given, on the decease of A. without issue, to the children of B., and by a codicil testator recited that he had already given the £3,000 to B. for life, with remainder to B.'s children, and then re-

voked the gift as to £2,000 and gave it to C. *Held*, that B. could not claim the other £1,000 for life. *Re Smith*, 2 Johns. & Hem. 594.

But a legacy will not be cut down by a mere misrecital of its amount in a codicil. *Gordon v. Hoffman*, 7 Sim. 29; *Mann v. Fuller*, Kay, 624.

A testator assigned as a reason for revoking a legacy to A. that he had provided A. with a permanent home, when, in fact, he had not so provided. *Held*, that the revocation was valid. *Hayes v. Hayes*, 6 C. E. Gr. 265.

The words in a will, "I have already given to my son John lot No. 1," which was not a fact, do not constitute a devise thereof. *Smith v. Meyers*, 2 U. C. Q. B. (O. S.) 801 (335). See *Edmunds v. Waugh*, 4 Drew, 75; *Denn v. Cornell*, 3 Johns. Cas. 174; *Burford v. Burford*, 29 Pa. St. 121.

A recital that the title to certain lands is in A., which, in fact, is in testator, does not amount to a devise thereof, but where the title should, in justice, be in A., equity will not correct the mistake. *Williams v. Allen*, 17 Ga. 81.

After giving to his daughter the use of the residue of his estate after her marriage, with remainder to her children, a testator, by codicil, revoked the gift because he declared that in consequence of nervous debility she was unfit to marry, and therefore should not marry. *Held*, that the court would not inquire into the fact whether the testator was mistaken or not with reference to his daughter's health or capacity. *Morley v. Reynoldson*, 2 Hare, 570.

If a testator assign as a reason for revoking a legacy that the legatee is dead, which is not true in fact, such revocation is void. *Campbell v. French*, 3 Ves. 321; *Barclay v. Maskelyne*, Johns. 124. See *Gifford v. Dyer*, 3 R. I. 99; *Ritter v. Fox*, 6 Whart. 99.

A testator, by codicil, recited that he thereby gave his grandson a legacy because he had disinherited him, whereas, in fact, he had given him a large legacy in the will. *Held*, that the legacy in the will was not revoked, but that the codicil was void for mistake. *Mordecai v. Boylan*, 6 Jones Eq. 265.

So, if a testator, believing his will to be lost, execute another which is probated, and afterwards the original is found. *Moresby's Goods*, 1 Hagg. 378. See *Pringle v. McPherson*, 2 Brev. 279; *Onions v. Tyrer*, 1 P. Wms. 345.

Testatrix bequeathed to A. "£300 due on bond." She owed A. only £120, but A. was held entitled to the £300. *Whitfield v. Clement*, 1 Meriv. 402. See *Wood v. White*, 32 Me. 340; *Sherwood v. Sherwood*, 45 Wis. 360.

A specific bequest made to testator's granddaughter in satisfaction of a debt said by testator to be due from him to her, whereas, in fact, it was due to her father, cannot be charged therewith. *Harrison v. Haskins*, 2 Pat. & H. 388.

Under a direction to pay debts, "including a debt of £300 owing from me to my daughter," whereas, the testator owed her only £150—*Held*, that she was not entitled to more than £150. *Wilson v. Morley*, L. R. (5 Ch. Div.) 776.

A testator gave a legacy to A., and by codicil stated that he had advanced a certain amount to A. which should be deducted from the legacy. *Held*, that the amount stated should be deducted, although the advancement was, in fact, less than that sum. *Aird v. Quick*, L. R. (12 Ch. Div.) 291; *Quibampton v. Going*, 24 W. R. 917; *McAlister v. Butterfield*, 31 Ind. 25; *Bunnell v. Bunnell*, 78 Ind. 163; *Jackson v. Payne*, 2 Metc. (Ky.) 567; *Barker v. Comins*, 110 Mass. 477; *Sayre v. Sayre*, 5 Stew. Eq. 61; 8 Stew. Eq. 563; *Outcalt v. Appleby*, 9 Stew. Eq. 75, note; *Painter v. Painter*, 18 Ohio, 247. See *Van Houten v. Post*, 6 Stew. Eq. 344; *Whately v. Spooner*, 8 K. & J. 543; *Hoak v. Hoak*, 5 Watts, 80; *Bullock v. Bullock*, 2 Dev. Eq. 307.

A testator gave his daughter "four hundred dollars that she has now in her possession." She never had that amount or any other of her father, but shortly before the will was made he endorsed and gave to her a promissory note of her husband for that sum. *Held*, that she had no claim for the legacy. *Snow v. Moore*, 107 Mass. 510.

As to the effect of a testator's mistake in the amount of a certain legacy, see *Read v. Strangways*, 14 Beav. 189; *Thomas v. Howell*, L. R. (18 Eq.) 198; *Milner v. Milner*, 1 Ves. Sr. 106; *Purser v. Snaplin*, 1 Atk. 414; *Danvers v. Manning*, 2 Bro. C. C. 18; *Jordan v. Fortescue*, 11 Jur. 549; *Brackenbury v. Brackenbury*, 2 Eden, 275; *Amb. 474*; *Berkeley v. Palling*, 1 Russ. 496; *Trevor v. Trevor*, 5 Russ. 24; *McLennan v. Wishart*, 14 Grant's Ch. 512.

Or his estate in lands. *Burger v. Hill*, 1 Bradf. 360; *Harmer v. Moulton*, 23 Fed. Rep. 5; *Farrer v. Ayres*, 5 Pick. 409. See *Wilkins v. Kennedy*, 9 East, 366.

The words in a will, "I acknowledge N., my second cousin, to be my next of kin and heir at law to all my property situate in M.," is an effectual gift to N., who was, in fact, neither heir nor next of kin of the testator. *Parker v. Nickson*, 1 De G., J. & S. 177.

A testator made a bequest to "my step-daughter Sarah," who was not, in fact, such, because the marriage of her mother to testator was void, as the mother knew, but Sarah and the testator did not. *Held*, that Sarah was entitled. *Wilkinson v. Jonghin*, 12 Jur. (N. S.) 330; L. R. (2 Eq.) 319.

A gift to a trustee was declared by the testator to be made in pursuance of a prior marriage settlement. *Held*, that the trustee was entitled thereto, although the marriage settlement was inoperative at the time the will was made. *Dyke v. Dyke*, 44 L. T. (N. S.) 568. See *Adams v. Adams*, 1 Hare, 587; *Machem v. Machem*, 28 Ala. 374.

See, further, *Cole v. Wade*, 16 Ves. 46; *Kennell v. Abbott*, 4 Ves. 808; *Florey v. Florey*, 24 Ala. 241; *Hearn v. Ross*, 4 Harring. 46; *Jones v. Habersham*, 63 Ga. 146; *Cleveland v. Carson*, 10 Stew. Eq. 377, and note; *Wallize v. Wallize*, 55 Pa. St. 242; *Whitlock v. Wardlaw*, 7 Rich. 453; *Eatherly v. Eatherly*, 1 Coldw. 461; *Hunt v. White*, 24 Tex. 643.

WEATHERHEAD vs. STODDARD.

[58 Vermont, 623.]

CONSTRUCTION OF A WILL.—VESTED AND CONTINGENT INTERESTS.

No estate will be held contingent unless very decided terms are used in the will, or it is necessary to hold the same contingent in order to carry out the other provisions or implications of the will; thus, the testator bequeathed his estate to trustees in trust for his daughter. They were directed to apply, if necessary, the whole income to her education and maintenance, and, when she should arrive at eighteen or be married, it was discretionary with them whether or not to deliver to her the whole estate. In case the legatee died before eighteen, the estate was disposed of by bequests over. She was never married, and died at twenty-three, with the funds in the possession of the trustees. *Held*, that the daughter took a vested estate at least when she was eighteen, which, upon her decease, passed to her devisees.

APPEAL from a decree of the Probate Court. Heard on an agreed statement of facts and the will of Alanson E. Weatherhead, September Term, 1885, Royce, Ch. J., presiding. Judgment affirming the decree of the Probate Court. The decree of the Probate Court was:

"It is ordered and decreed by the court here that all the property and estate left in trust by the will of Alanson E. Weatherhead passes by the will of said Mary H. Weatherhead as her will directs, and that the balance of \$5,783.19 remaining in the hands of said executor be held in trust by the said E. W. Stoddard during the life of Gertrude A. Lynde, now Mrs. Gertrude A. Hunt, and the annual interest and use thereof paid to her; after the decease of said Gertrude A. Hunt the

principal to be paid and transferred to the residuary legatee named in the will of said deceased."

The fourth clause of the will commenced as follows: "And in case the said Phœbe Mary Hope Weatherhead shall de cease before arriving at the age of eighteen years, then I give and bequeath to the said Lysander W. Howe, the sum of five hundred dollars in current money, in case he shall survive the said Phœbe, and the rest and residue of my estate, after the payment of the legacy aforesaid, to be divided as follows, to wit," &c.

The other facts are sufficiently stated in the opinion of the court.

James M. Tyler and Martin & Eddy, for plaintiff.

Haskins & Stoddard, for defendant.

ROWELL, J. Alanson E. Weatherhead died testate in 1862, leaving only one child surviving him, Phœbe Mary Hope Weatherhead, then about two years old. His will was duly probated, and the third clause of it reads as follows:

"I give and bequeath all my estate, real and personal, to Galusha Weatherhead, Marcus Weatherhead, and Lysander W. Howe, to be held by them in trust for my daughter and only child, Phœbe Mary Hope Weatherhead; and I hereby direct the trustees above mentioned to apply from time to time such portion, or if necessary the whole, of the income from said trust estate towards the support, maintenance, and education of the said Phœbe Mary Hope Weatherhead; and when she shall arrive at the age of eighteen years, or in case she shall marry before arriving at the age aforesaid, then in either case the said trustees shall pay over to the said Phœbe Mary Hope Weatherhead the whole of said trust estate, or such portion thereof as in their judgment and discretion shall seem most for the benefit and advantage of the said Phœbe—and I leave this matter to the best judgment and discretion of the aforesaid trustees."

By the fourth clause of his will, in case the said Phœbe

died before eighteen, the testator disposed of all his estate by divers bequests over.

The said Phoebe was never married, and died testate at about the age of twenty-three. Her will was duly probated, whereby, after one or two small specific legacies, she gave the use of the residue of her estate to Gertrude A. Lynde—now Mrs. Hunt—for life, with remainder over.

Said trustees retained in their hands all of said estate, paying therefrom only what was necessary for the support and education of the said Phoebe, and never paid the same over to her after she became eighteen, acting in withholding it according to their best judgment and discretion, and as they deemed most for her benefit and advantage, and she never demanded it of them.

The plaintiff claims that by the terms of the will the taking of a vested interest in her father's estate by the said Phoebe was made to depend upon the judgment and discretion of the trustees, and as their judgment and discretion were never exercised in her favor by paying over the estate to her, that she never took a vested interest therein; while the defendant claims that she took a vested interest therein on the death of her father, subject to be defeated only by her death before eighteen, and that on becoming eighteen the estate became hers absolutely, and would have descended to her heirs had she died intestate, and that if it did not vest in her at least at eighteen, then there was no testamentary disposition of it after that, and so she took it by inheritance.

This last contention is not sound; for there was at all events a discretionary trust, liable to be executed in favor of the said Phoebe by paying the fund over to her at any time after she became eighteen, and hence there was a testamentary disposition, operative as long as she lived with the trust unexecuted; for the legal estate, which vested in the trustees by the will, would continue in them as long as the purposes of the trust required it. (Bayley, J., in *Doe d. Player v. Nicholls*, 1 B. & C. 336.)

This brings us to the single question, whether the said Phoebe ever took a vested interest in this estate.

The proposition is deducible from the authorities, especially from the more recent English authorities, that no estate will be held contingent unless very decided terms of contingency are used in the will, or it is necessary to hold the same contingent in order to carry out the other provisions or implications of the will. (2 Red. Wills, 627.)

If the testator had stopped with directing the trustees to pay over the estate to his daughter on arriving at eighteen or marrying, it is clear on all the authorities that the legacy would have vested on the happening of either of those events if not before; and so it comes to this, whether the discretionary clause makes any difference. We think it does not, both on the construction of the will and on authority.

When a man sits down to dispose of his property by will, it is fair to presume that he does not intend to die intestate nor to become intestate after death, and so courts lean against intestacy. Now here the testator made no bequests over except in the single event of his daughter's dying *before* eighteen. If, then, she did not take a vested interest at least *at* eighteen, the testator become intestate at her death, and his estate is left to be distributed by law; for it would be absurd to read this will as giving bequests over in case his daughter died *after* eighteen, as she did. Then again, the very fact that he made no disposition over in case she died *after* eighteen, is a circumstance of no little weight to show that he intended his estate to vest in her at all events on her becoming eighteen. (2 Red. Wills, 606.) In England a gift over in one event is generally regarded as favoring vesting in all other events, on the ground that the gift over being made to depend upon particular events, the presumption is that in every other event the estate was intended to remain in the first taker. But we think, as said by Judge Redfield, that this form of argument is more forcible when there is no disposition over, for then it may well be said that the testator intended the estate to vest in the last donee named.

The trustees were the brothers and a brother-in-law of the testator. He made them his executors, and, reposing confidence in them, was willing to leave it to them as trustees to

say *when and to what extent* his daughter, after becoming eighteen or marrying, should be permitted to come into the actual possession and enjoyment of his estate; but we do not think he intended to leave it to them to say whether she should ever have it at all or not in *interest*. He had willed it "*in trust for her*," and the discretionary clause—treating it as valid, but as to which see *Gray, Perp.* (§ 120)—was inserted for her supposed benefit, and more by way of giving directions to the trustees as to the time and manner of payment than as importing condition or contingency. And this idea of a trust is important, and well-nigh decisive of the case. The remarks of Lord Justice Turner on this subject in *Oddie v. Brown* (4 De G. & J. 179, 193) are exceedingly pertinent. He says: "When, as in this case, funds are given to trustees to be held by them upon trusts, directions must of course be given to them as to the time and manner in which they are to deal with the funds in favor of the persons for whose benefit they are intended. Words, therefore, that in other cases might import condition or contingency, may in such cases be used for a wholly different purpose, namely, for the purpose of conveying the necessary directions to the trustees. The court, therefore, in such cases, looks, I apprehend, more to the substance of the gift than to the words in which it is expressed. It considers for whose benefit it was made—who were intended to be the *cestuis que trust*." And the same idea is brought out by Lord Cottenham in *Saunders v. Vautier* (1 Cr. & Ph. 240), where he says: "It is argued that the testator's great nephew does not take a vested interest in the East India stock before his age of twenty-five, because there is no gift but in the direction to transfer the stock to him at that age. But is that so? There is an immediate gift of the stock; it is to be separated from the estate and vested in trustees; and the question is whether the great nephew is not the *cestui que trust* of the stock. It is immaterial that these trustees are also executors; they hold the stock as trustees, and the trust is, to accumulate the income till the great nephew attains twenty-five, and then to transfer the stock and the accumulated interest to him. There is no gift over, and the stock either

belongs to the great nephew or will fall into the residue in the event of his dying under twenty-five. I am clearly of opinion that he is entitled to it." It is not enough to say that the Court of Chancery would not have controlled the judgment and discretion of these trustees further than to have compelled an honest exercise thereof, according to *Bacon v. Bacon* (55 Vt. 243), *Sharon v. Simmons* (30 Vt. 458), *French v. Davidson* (3 Mad. 396), and *Walker v. Walker* (5 Mad. 424); for that is quite another question from saying whether this legacy vested, and is not at all determinative of it, for the legacy might have vested, and yet the legatee not have been entitled to the possession and full enjoyment of it.

We have carefully examined all the cases cited in the argument and many others, but shall not attempt to review them all. The first case to which we desire to call attention is *Churchill v. Lady Speake* (1 Vern. 251), which was this: Prideaux, plaintiff's grandfather, bequeathed to his wife a mortgage of £1,000, desiring her to give £500 of it to the plaintiff, "but for the time and manner of doing it" he left "it freely to herself, and as she shall see it best for her." The testator died about 1664, the plaintiff then being about nine years old. Mrs. Prideaux, plaintiff's grandmother, lived till 1683, when she died, making the Lady Speake her executrix, having paid no part of the £500, neither was the same in all that time so much as demanded of her. Plaintiff's bill was to have this legacy of £500 paid to her with interest; and the Lord Keeper, notwithstanding there was no demand proved, and though the testator left the time and manner of paying to his wife, decreed the £500 with interest from the death of the testator, being near twenty years. A note to the case says that the court was fully satisfied that the nature of the case was a trust in the grandmother for the plaintiff.

In *Hone's Executors v. Von Schaick* (20 Wend. 564), the testator gave \$6,000 to each of his grandchildren who should be living at the time of his death, to be paid to them respectively on attaining the age of twenty-one or marrying, such payments, however, not to be made *without the approbation* of the parents of such grandchildren expressed in writing,

and it was held that the legatees severally took a vested interest immediately on the death of the testator. Mr. Justice Bronson, speaking for the court, said if the testator had stopped after directing the legatees to be paid on attaining twenty-one or marrying, the legacies would clearly have been vested, and that the clause requiring the approbation of the parents made no difference, that it provided for only a future postponement of the time of payment, that the gift was still absolute, and referred to *Churchill v. Lady Speake* (1 Vern. 251) as authority. It is true that case is a little different from this, for there the gift was directly to the legatee, while here it is contained in the direction to pay; but Vice-Chancellor Wigram says that the court never intended to decide that the gift of a legacy under the form of a direction to pay at a future time or on a given event, was less favorable to vesting than a simple and direct gift of a legacy at a like future time or on a like event, but has intended only to assimilate those cases to each other, and to distinguish both from the class of cases in which there has been a gift of a legacy and also a direction to pay at a future definite time distinct from the gift. (*Leeming v. Sherratt*, 2 Hare, 14, 18.)

Millard's Appeal (87 Pa. St. 457) is much in point. There the testator willed to his executrix \$30,000 in trust, to be put at interest, and to pay over the interest from time to time when and as received unto his nephew, Joseph M. Millard; and in case the said Joseph should be sober and industrious in his habits, the executrix was authorized "to pay over to him from time to time such portions of the principal as she in her judgment shall deem right and proper, or she may at any time she may deem it right and proper pay over to him the whole of the said \$30,000." In the exercise of the discretion thus conferred upon her, the executrix had paid to him a little more than \$4,000 of the principal when he died, leaving a widow, the appellant, and one daughter, Margaret Blanche Millard, and this appeal was taken from a decree dismissing exceptions filed to the executrix's final account as trustee of the fund, on the ground that she had not therein charged herself with the balance of the principal in her hands, and it was

held that the legacy vested. The court said that plainly the testator intended to give the entire beneficial interest to his nephew, and that the discretionary clause in nowise affected the question of intent, but was designed to provide for the nephew, and at the same time to prevent the fund from being wasted through idleness or intemperance; that as the condition on which the principal was to be paid had become impossible of performance by the death of the nephew, and as the trustee could not keep the money, and there was no gift over, and it did not pass under the residuary clause, either the testator died intestate as to this fund or it must go to the personal representative of the nephew; that the court regarded the question as free from doubt, but said if it did not, it would feel bound to apply the rule favoring vested rather than contingent estates, primary rather than secondary intent. The court, indeed, laid stress on the fact that there was an absolute gift of the income, and said that a gift of the income of a fund without limitation as to time was a gift in perpetuity, and carried the fund itself; and if we were to adopt plaintiff's theory as to the non-vesting of this legacy on other grounds, and follow some recent and very respectable English authorities—which we do not find it necessary to do in order to sustain our judgment—we should have that precise element in this case, namely, a gift of the income of the entire estate without limitation as to time. Thus, in *Fox v. Fox* (L. R. 19 Eq. Cas. 286), there was a discretionary power in the trustees to apply the whole income of the fund, or so much thereof as they might from time to time think proper, for the maintenance and education of the legatees until their shares became payable, which was at twenty-one, and the question was whether there was a gift of the *whole* income, within the rule laid down in *Watson v. Hayes* (5 My. & Cr. 125) and other cases, that a legacy which, upon the terms of the gift, would be contingent on the legatee's attaining a certain age, may become vested by a gift of the interest in the meantime, whether directly or in the form of maintenance, provided it be the *whole* interest; and it was held on the authority of *Harrison v. Grimwood* (12 Beav. 192), that it was a gift of the *whole* income, followed

by a discretion to apply less than the whole, and consequently that the legacy vested, "and not the less so because there was a discretion conferred on the trustees to apply less than the whole income for that purpose."

So in *Rouse's Estate* (9 Hare, 649) there was a gift of a legacy in trust, to apply so much of the interest thereof as the trustees should think proper in the maintenance of the testator's grandson until twenty-one, and then to pay the whole interest to him for life, and on his death, to stand possessed of the legacy and interest and all accumulations in trust for his children, with remainder over in default of children; and it was held that the provision for maintenance of the grandson during minority out of the interest, showed that the interest was intended for him; that the legacy vested in interest though not in possession before he became twenty-one; and that he was entitled to the interest that accrued during his minority and was not applied in his maintenance; and *Wynch v. Wynch* (1 Cox Ch. 438) was regarded as strong authority on the point. There a father gave legacies to his daughters, payable at twenty-one or marriage, but he made provision for their maintenance in the meantime out of another fund, and it was held that the legacies did not carry interest till the time of payment; but the Master of the Rolls said if maintenance had been payable *out of* the interest of the legacies, he should have thought the daughters entitled to what they claimed.

None of the cases referred to by the plaintiff are at all in conflict with the views here expressed.

In *Pink v. De Thuissey* (2 Mad. 157) the executor was directed to give the legatee the principal of the legacy "only in case of an establishment or acquisition for him which seems advantageous to my executor, this disposition being an essential condition of the legacy I make to the said" legatee, and it was held, taking the whole will together, that as to the principal of the legacy, the intention was to give it on condition and not absolutely.

In *Malcolm v. O'Callaghan* (2 Mad. 349) the testator gave £2,000 to his two daughters, to be paid on marriage with con-

sent of his executors, and if either died before twenty-five or married without consent, her legacy went to the other. One married before twenty-five without consent, and it was held that the intent was clear to make marriage with consent a condition precedent, and that, there being no bequest over, the condition must be complied with in order to entitle her to claim the legacy. *Atkins v. Hiccocks* (1 Atk. 500) is to the same effect.

Judgment affirmed and ordered to be certified to the Probate Court.

WARNER vs. WILLARD.

[54 Connecticut, 470.]

RESIDUARY BEQUEST.—PRESUMPTION AGAINST INTESTACY AS TO
ANY PART OF THE ESTATE.

Where a testator, after sundry pecuniary legacies to his children and the gift of a life estate in his realty to his wife, made the following residuary bequest: "All the residue of my estate of whatever kind I give to my wife," but made no disposition of the fee of his realty, it was held that the widow was entitled to the fee in addition to the life estate expressly given her, in her husband's lands.

AMICABLE submission of a question involving the construction of a will. The opinion states the case.

E. D. Robbins, for the plaintiff.

C. M. Joslyn, for the defendant.

GRANGER, J. This is an amicable suit to obtain a construction of the will of William Willard. The first clause of the will is as follows:

"I give and bequeath to my beloved and faithful wife,

Jane G. Willard, the use and improvement of the real estate of which I may die possessed, during her natural life. I also give to her, the said Jane G., all my household furniture of every name and kind."

The testator then gives to one daughter \$2,500; to another, \$2,000; to his son, \$2,000 and his gold watch, gold-headed cane and wardrobe; and to an adopted son \$1,000. Then follows the sixth clause of the will, which is as follows:

"All the residue of my estate of whatever name or kind, after payment of my debts and funeral charges, I give and bequeath to my wife, Jane G. Willard."

The residue of the estate of course includes the fee of the real estate, of which only the life use had been given by the first clause and which had not been disposed of by any other clause of the will, unless from the whole will we can gather the intent of the testator not to include it.

The defendant contends that, taking this clause in connection with the first, it is evident that the testator intended to give his wife only a life use of the real estate and that this gift of the residue must therefore be regarded as intended to embrace only the personal estate. The facts are found with regard to the amount of the testator's personal and real estate, but they throw no light upon this question.

It is difficult to discover any reason why the testator should have given his wife a life estate only, in the first clause of the will, and the fee of the same real estate by the residuary clause. But the question for us to consider is not why he did what he did, but simply what has he in fact done. We must look for his intention only in the will itself, and in that he has expressed himself in language free from all ambiguity. He not only speaks of "all the residue," but of "all the residue of my estate *of whatever name or kind.*" It would hardly be possible for language to be more comprehensive.

Were the matter left in any doubt, there is a further consideration that would be decisive. If the fee of the real estate does not pass by the residuary clause, then it is not disposed of, and becomes intestate estate. But there is

always a presumption that when a party makes a will he intends to dispose of all his property, and not to die intestate as to any part of it. "Every intendment is to be made against holding a man to be intestate, who sits down to dispose of the residue of his property." (*Booth v. Booth*, 4 Ves. 407.) To the same effect are *Higgins v. Dwen*, 100 Ill. 554, 556; *Smith v. Smith*, 17 Gratt. 268; *Irwin v. Zane*, 15 W. Virg. 646.

Our conclusion is that the widow took the fee of the real estate, and the Superior Court is so advised.

In this opinion the other judges concurred.

IN RE CUSHING'S WILL.

[58 Vermont, 393.]

ANNUITY IN LIEU OF DOWER.—APPORTIONMENT.—INTEREST.

An annuity given to a widow in lieu of dower is apportionable, and payable for a part of the year, to the time of the annuitant's death.

APPEAL from the Probate Court. Heard on a commissioner's report, December Term, 1885, Taft, J., presiding. Judgment *pro forma* for the appellant.

French & Southgate and *W. E. Johnson*, for appellant.

Barrett & Barrett, for appellee.

VEAZEY, J. The question is as to the proper construction of the provisions of the will of Nathan Cushing, deceased, in behalf of his wife. He first willed her \$1,000; then follows the principal clause in controversy, viz. :

"I also give and bequeath to my said wife the whole inter-

est and income of \$6,000, to be paid to her each and every year during her life, the first payment to be made at the close of one year after my decease, and so on annually thereafter as long as she shall live. And if said interest or income shall at any time prove insufficient to support her in a manner becoming her station and condition in life, and in such manner as shall make her comfortable, and meet all necessary expenses of a reasonably prudent course of life, then it is my will that so much of the said \$6,000 shall be taken as shall be necessary to effect the object aforesaid."

He then gives his wife certain household furniture and clothing, and, after other provisions in her behalf, he provides that these "bequests and provisions" were to be upon condition that she should *relinquish and waive* her right to dower and assignment of any other personal property to her. He then makes bequests to others, but not sufficient to exhaust his estate, and then disposes of the residue to his children. He then provides that his personal estate shall be sold, and the real estate sold or rented, as shall be for the best interests of all concerned, "and shall enable him" (the executor) "to raise funds to pay debts, legacies, and necessary expenses."

He died leaving an estate of some \$30,000.

We think it is very clear that it was the intention of the testator, by the provision for his wife above quoted in full, to give her the whole of the interest and income of \$6,000 during her life for her support, without deduction of taxes or expenses. The language of the provision imports this, and such construction is strongly aided by the other provisions alluded to, and by the circumstances of his estate and condition. This intent, being manifest from the words of the will as a whole, must be followed (*Richardson v. Paige*, 54 Vt. 373), there being no other provision inconsistent with this one creating a legal impossibility that the two can subsist together. (*Hibbard v. Hurlburt*, 10 Vt. 173.)

But it is claimed that the testator provided an annuity for his wife, and as, at the common law, annuities are not apporportionable, and as we have no statute making them so, her execu-

tor, she being dead, had no right to the interest on the \$6,000 which had accrued during the portion of the last year of her life previous to her decease, the provision for the payment of the interest being that it should be paid annually.

Treating this as an annuity, the proposition is sound that "annuities are not in their nature apportionable either in law or in equity." (2 Williams' Ex. 835.) But there are exceptions to the rule, and the same author says: "With respect to interest—interest being due *de die in diem* is not one entire thing, but an aggregate of many distinct things," and may be apportioned. The language last quoted was evidently borrowed from the note to *Clun's Case*, reported in Coke's Reports (vol. 5, pt. 10, 128, a). The note is by Fraser, wherein he says, after the remark adopted by Williams: "It is obvious, therefore, that the representatives of a party dying before the day at which interest was usually payable, would be entitled to interest up to the time of the party's death." (*Edwards v. Warwick*, 2 P. Wms. 171; *Hay v. Palmer*, 2 Id. 501; *Banner v. Lowe*, 13 Ves. 135; *Wilson v. Harman*, 2 Ves. Sen. 672.)

In *Perry on Trusts* (§ 556), the author says: "But where an annuity is given to a *widow in lieu of dower*, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant;" and he cites *Pearly v. Smith* (3 Atk. 260), *Howell v. Hanforth* (2 Black. W. 1016), *Green v. Osborn* (17 S. & R. 171). And he says further: "But interest money upon notes, mortgages, and similar securities, accrues from day to day, although it is not payable until a fixed day, it is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives," and cites *Earp's Will* (1 Pars. Eq. 453; 28 Penn. St. 368); *Sweigart v. Berk's Adm'r* (8 S. & R. 299); *Roger's Trust* (1 Dr. & Sm. 338). I find these authorities support the propositions so far as I have access to them.

We think that we are justified by authority in holding to an apportionment in this case, especially in view of the fact

that it will be the fulfillment of the wish and intention of the testator as indicated by the terms of the will.

Therefore, the decree of the Probate Court should have been affirmed.

The *pro forma* judgment of the County Court is reversed. Judgment for the appellee for the amount allowed by the Probate Court, with interest from date of appeal and costs; and let this be certified to the Probate Court.

BEARDSLEY *vs.* SELECTMEN OF BRIDGEPORT.

[53 Connecticut, 489.]

CONSTRUCTION OF A WILL.—BEQUEST FOR CHARITABLE PURPOSES.—UNCERTAINTY.

A bequest to selectmen "for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans," in a designated town, is not void for uncertainty.

Suit by an executor, for advice as to the construction and validity of certain bequests in a will and codicil; brought to the Superior Court.

The will in question was that of Aaron Summers, of Bridgeport, Conn., who died in April, 1884. It was dated March 16th, 1881, and was as follows:

"I, Aaron Summers, of Bridgeport, do will and bequeath the use of my whole estate, both personal and real, after my just debts and funeral charges are paid, to my wife, Anna Maria, while she remains my widow. After her second marriage, if it should ever occur, or her decease, I will the whole of my estate, both personal and real, to be disposed of within a reasonable time after my decease and hers (meaning my wife) by my executor, and deposited in some safe banking institution or institutions in the town of Bridgeport, or within the State

of Connecticut, to be used discretionary by the acting selectmen of said Bridgeport, for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, until all is expended. I also will that not one of my connections shall have a dollar; also, not one of my wife's connections shall have a dollar, but strictly among those entirely disconnected, as mentioned in this will. No partiality to friends."

On the 18th of October, 1882, the testator executed the following codicil to his will:

"I, Aaron Summers, being still of sound and disposing mind and memory, and desiring in some respects to change my last will, dated March 16th, 1881, do hereby make, publish and declare the following as a codicil to said last will, in manner and form following, to wit:

"*First.* I give and bequeath unto the Bridgeport Protestant Orphan Asylum of Bridgeport, Conn., the sum of one thousand dollars, to be used for the general purposes of said asylum.

"*Second.* I give and bequeath unto the Bridgeport Hospital the sum of one thousand dollars, to be used for the general purposes of said hospital.

"I hereby revoke and annul any and all parts of my said will which are inconsistent with this codicil, but the remainder of said will I hereby distinctly reaffirm and publish."

R. C. Amber, for the executor.

J. A. Joyce, for the selectmen of Bridgeport.

J. J. Rose, for the Bridgeport Hospital.

H. S. Sanford, for the Bridgeport Orphan Asylum.

J. C. Chamberlain, for the widow.

L. Warner, for the heirs at law.

PARDEE, J. By his will, as originally made, Aaron Summers gave to his wife the use of his entire estate during life or widowhood; by the codicil he gave \$1,000 to the Bridgeport Protestant Orphan Asylum, and \$1,000 to the Bridgeport Hospital. The claim of the widow is, that she is to have the use for life of the entire estate, and that neither of these legacies is payable until after her death. But the office of this codicil is to change what had been written before; it is the latest and controlling expression of the testator's wish. The bequests thereby made are absolute in terms; as perfectly so as if the devise of the life use to the wife in the will. The expressions are all free from ambiguity; all express a legal intent in legal language; and in them the rules of law require us to find the precise extent of the changes intended by the testator. These legacies are therefore payable at the usual time.

Subject to the use for life by his wife, and to diminution by certain legacies, the testator disposes of his estate as follows: "To be used discretionary by the acting selectmen of said Bridgeport for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut, until all is expended."

It is the claim of the heirs at law that this bequest is void for uncertainty as to the persons composing the class to be benefited, and they have pressed upon our attention the doubts and difficulties which will beset the trustees whenever they shall attempt to select the beneficiaries. But notwithstanding the accumulation of adjectives, the bequest is within our statute of charitable uses as interpreted by this court; for it is to be borne in mind that the question before us is not—are there not many persons concerning whom there must be doubts whether they can meet some of the requirements of the testator? but it is, are there not many concerning whom no doubt can exist that they are able to meet them all? Each one of the adjectives is of common use and has as definite and precise a meaning as have most words in the language. Of course there are all grades of character and pecuniary condi-

tion, and all shades of color; of course men may profess the Protestant faith and worship after its forms; may advocate the principles of the Democratic party and vote for its candidates, and yet at heart accept neither. But, notwithstanding all this, men are constantly deciding and acting, in matters which concern both property and person, upon the belief that they will not be misunderstood when they use adjectives like these under consideration. The business of the world will not, cannot, wait until every word shall become mathematically precise.

The office of selectmen is continuous by law. The persons from time to time constituting the board of selectmen of the town of Bridgeport are joint trustees in perpetual succession, clothed with power and placed under obligation to select beneficiaries from the classes specified by the testator and apply either the interest or the principal of the fund to the relief of their necessities at discretion.

The beneficiaries must be "poor." This word as used by the testator includes all those who have exhausted all means of support and are in a condition to require public aid for the supply of their necessities; certainly it includes those who, as paupers, are receiving such aid, and, therefore, beyond all question within the statute.

They must be "worthy and deserving." In *White v. Fisk* (22 Conn. 31), the descriptive adjective was "pious;" in *Treat's Appeal from Probate* (80 Conn. 113), this court said of the will under consideration in *White v. Fisk*, that the testator "had provided in his will no way of selecting the beneficiaries from a class, and the court held that they could not, even as a court of equity, do it for him. Had that power been given to his executors or trustees the clause in the will would have been sustained." To determine that one is "worthy and deserving," is no more difficult than to determine that he is "pious."

They must be "white." In *Treat's Appeal from Probate*, just referred to, they were "Indians and Africans," and the bequest was sustained. It is as difficult to declare of a person that he has color as that he has none. For many years by the

constitution of this State only white men were permitted to vote; if the word has in the general mind a meaning so sharply defined as that it can be put to a use so practical and so important, we think it may well support a charitable bequest.

They must be "American." In the general mind this adjective now describes the descendants of Europeans born in America, and is applied especially to the inhabitants of the United States; persons quite as easily distinguished as Indians and Africans.

They must be "Protestant." This adjective was defined and declared capable of sustaining a charitable bequest by this court in *Tappan's Appeal from Probate*, 52 Conn. 412.

They must be "Democratic." It is a matter of common knowledge that there is a political party known as the Democratic party, to which a large portion of the voters in every one of the United States adhere; which they support by speech and act—by advocating its principles and voting for its candidates for office; and that the determination of the question as to what persons and principles shall be in the ascendant in government for the time being depends upon the belief of the voter that the speech and the act of the candidate are true indexes of his opinion. The trustees are to inquire and decide concerning a given man whether they believe that he adhered to and supported the principles of the Democratic party; and they may well rest upon reasons which are sufficient to control the general mind of voters in a matter of the highest importance.

They may be "orphans." This word describes a child who has lost one or both of its parents. He may be extremely young and so of course without character, religious belief, or political principles, and as by law neither women nor children vote, so in the common speech neither are said to have Democratic or other political principles. Therefore it must be determined to have been the intent of the testator, as to an orphan not of sufficient age to have acquired a character, that he should have been born of white, American and Protestant parents, of a Democratic father, and be destitute; and as

to a widow, that she should be worthy, deserving, poor, white, American, Protestant, and have had a Democratic husband.

The Superior Court is advised that the bequest for "the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut," is valid; and that the legacies by the codicil to the Bridgeport Protestant Orphan Asylum, and to the Bridgeport Hospital are payable at the expiration of one year from the death of the testator.

In this opinion the other judges concurred.

Of charitable bequests.—A charitable bequest is not necessarily invalid because the will does not provide a trustee. Cod. Theodos. lib. 16, tit. 2, 1, 20; *Eyre v. Shaftesbury*, 2 P. Wm. 108, 108; s. c. 7 Ves. Jr. 68, 68; *Anon.*, 1 Ch. Cas. 267; *Lord Falkland v. Bertie*, 2 Vern. 342; *Corp. of Ludlow v. Greenhouse*, 1 Bligh R. (N. S.) 48; *Attorney-General v. Mayor of Dublin*, 1 Bligh R. (N. S.) 812; *Attorney-General v. Middleton*, 2 Ves. 327; s. p. *Attorney-General v. Brereton*, 2 Ves. 425; *Baptist Association v. Hart's Exrs.*, 4 Wheat. R. 1; *McCord v. Ochiltree*, 8 Blackf. 15; *Mills v. Farmer*, 1 Meriv. 55; *Attorney-General v. Brentwood School*, 1 Mylne & Keen, 376; *Vidal v. Girard's Exrs.*, 2 How. 155; *Maggridge v. Thackwell*, 7 Ves. 86; *Attorney-General v. Jackson*, 11 Ves. 365; *West v. Knight*, 1 Ch. Cas. 185; *Attorney-General v. Hickmen*, 2 Eq. Cas. Abr. 198; *White v. White*, 1 Bro. Ch. Cas. 12; *Attorney-General v. Mayor of Coventry*, 7 Bro. Parl. Cas. 236; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491; *Attorney-General v. South Sea Company*, 4 Beav. 458 (b); *Attorney-General v. Boucherett*, 25 Beav. 116; *Bliss v. American Bible Society*, 2 Allen, 384; *Com. v. Bonsall*, 8 Whart. 559; *Evines' Appeal*, 4 Harris, 44; *Louisville v. Trustees*, 15 B. Mon. 642; *Yarmouth v. Yarmouth*, 34 Me. 411; *Sheriff v. Lowdnes*, 16 Md. 357; *Edwards v. Jagers*, 19 Ind. 407; *Vincennes University v. Indiana*, 14 How. 269; *Washburn v. Sewall*, 9 Metc. 280; *Sohier v. St. Paul's Church*, 12 Metc. 250; *Brown v. Kelsey*, 2 Cush. 243; *Groton v. Ruggles*, 17 Me. 187; *Beatty v. Kurtz*, 2 Pet. 588; *Burr v. Smith*, 7 Vermont, 210; *Bartlett v. Nye*, 4 Metc. 378; *Potter v. Chapin*, 6 Paige, 649; *Phillips Academy v. King*, 12 Mass. 546; *Preachers' Aid Society v. Rich*, 45 Me. 552; *Tappan v. Deblois*, 45 Me. 122; *Philadelphia v. Fox*, 64 Penn. St. 169; *American Bible Society v. Wetmore*, 17 Conn. 188; *Grines v. Har-*

mon, 85 Ind. 198; *Missionary Society of the Methodist Episcopal Church v. Chapman et al.*, 128 Mass. 265; *Schouler's Petition*, 184 Mass. 426; *Williams v. Pearson*, 88 Ala. 299; *Walker v. Walker*, 25 Ga. 420; *Zanesville C. & M. Co. v. Zanesville*, 17 Ohio St. 352; *Treat's Appeal*, 30 Conn. 118.

A bequest is void for uncertainty when the particular intent of the testator cannot be ascertained because the objects of the trust are not sufficiently pointed out. *James v. Allen*, 3 Meriv. 17; *Miller v. Rowen*, 5 Cl. & F. 99; *Morice v. Bishop of Dunham*, 9 Ves. 399; *Ewen v. Bannerman*, 2 Dow. & Cl. 74; *Attorney-General v. Haberdasher's Co.* 1 Myl. & K. 420; *Nash v. Morley*, 5 Beav. 177; *Williams v. Kershaw*, 5 Law J. (N. S.) Ch. 84; s. c. 5 Cl. & F. 111; *Norris v. Thomson*, 4 C. E. Green, 877; *Briggs v. Perry*, 3 De G. & Sim. 525; s. c. 3 Macn. & Gord. 546; *Thayer v. Wellington*, 9 Allen, 288; *Ralston v. Telfair*, 2 Dev. Eq. 255; *Dorley v. Attorney-General*, 4 Vin. Ab. Charitable Uses, c. pl. 16; s. c. 2 Eq. Cas. Ab. 194, pl. 15; s. c. 7 Ves. 58, n.; *Harding v. Glyn*, 1 Atk. 469; *Burrough v. Philcox*, 5 Myl. & Cr. 72; *Salisbury v. Denton*, 3 K. & J. 529; *Harris v. Du Pasquier*, 26 L. T. (N. S.) 689; *Zeisweiss v. Jones*, 68 Pa. St. 465; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Baker v. Clark*, 110 Mass. 88; *Sanderson v. White*, 18 Pick. 328; *Olliffe et ano. v. Wells' Exrs.* 180 Mass. 221; *Nichols v. Allan Exr.* 180 Mass. 211; *Estate of Hinckley*, 58 Cal. 457; *Estate of Robinson*, 68 Cal. 620; *Paschal v. Acklin*, 27 Tex. 173.

But where the bequest is to some association whose duty it becomes to dispose of the charity, or where the will confers the power upon the executors, trustees, &c., to discriminate and select or apportion the application of the fund, a means is given whereby the objects can be designated and the bequest is valid. *Reade v. Silles* (27 Eliz.), Acta Canc. 559; *Attorney-General v. Webster*, L. R. 20 Eq. 438; *Attorney-General v. Hotham, Turn. & Russ.* 209; *Powell v. Attorney-General*, 3 Meriv. 48; *Attorney-General v. Comber*, 2 Sim. & Stu. 98; *Sorresly v. Hollins*, 9 Mod. 221; s. c. 1 Coll. Jurid. 439; *Mayor, &c., of Faversham v. Ryder*, 5 De Gex, Macn. & Gord. 89; *Attorney-General v. Whitchurch*, 3 Ves. 144; *Seguine v. Seguine*, 3 Keys, 663; *Williams v. Williams*, 4 Seldon, 525; *Liley v. Hey*, 1 Hare, 580; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Thompson v. Thompson*, 1 Coll. 881; *Kendall v. Granger*, 5 Beav. 800; *West v. Knight*, 1 Ch. Cas. 184; *Dent v. Allcroft*, 30 Beav. 840; *Trustees of Smith's Charities v. Northampton*, 10 Allen, 498; *Norru v. Thompson's Exr.* 19 N. J. R. 307; *Hoey v. Kenny*, 25 Barb. 396; *Chambers v. St. Louis*, 29 Mo. 548; *Curtis v. Hutton*, 14 Ves. 539; *Matter of Hagenmeyer's Will*, 12 Abb. N. C. 432; *Sanderson v. White*, 18 Pick. 338; *Clapp v. Fullerton*, 34 N. Y. 197; *Holmes v. Mead*, 52 N. Y. 332; *Suter, Adm'r v. Hilliard et al.* 132 Mass. 412; *Rotch v. Emerson*, 105 Mass. 431; *Power v. Cassidy et al.* 79 N. Y. 602; s. c. 1 Am. Prob. R. 368; aff'g 16 Hun,

294; Vaux's Appeal, 109 Pa. St. 497; Lewin on Trusts, c. 2; Stevens' Adm'x v. Burgess et al. 61 Me. 39.

A devise to the trustees to an unincorporated association is an executory devise, and, unless prohibited by statute, will be sustained. Isaac v. Gumperz, Ambl. 238, n.; Attorney-General v. Stepney, 10 Ves. 22; Boyle on Charities, 100; Betts v. Betts, 4 Abb. N. C. 317; People v. Thompson, 21 Wend. 235; Commonwealth v. Allegheny County, 20 Pa. St. 185; Marx v. McGlynn, 88 N. Y. 357; Tappan's Appeal, 52 Conn. 412; Parker v. Parker, 123 Mass. 584; Tappan v. Deblois, 45 Me. 122; Preachers' Aid Society v. Rich, Id. 552.

The existence of a *cy pres* power as inherent in courts of equity in the United States has been generally denied. Here courts of equity act judicially, and not as *parens patriæ*, and will not divert an illegal or uncertain gift to a charitable object nowise intended by the testator. Curling v. Curling, 8 Dana, 38; Chambers v. St. Louis, 29 Mo. 543; Grines v. Harmon, 35 Ind. 249; Gillman v. Hamilton, 16 Ill. 225; Starkweather v. American Bible Society, 72 Ill. 50; Miller v. Chittendon, 2 Iowa, 315; Lapage v. McNamara, 5 Iowa, 146; Carter v. Balfour, 19 Ala. 814; Adams v. Bass, 18 Ga. 130; Beekman v. Bonsor, 27 Barb. 260; Dublin Case, 38 N. H. 510; Bartlett v. King, 12 Mass. 545; Burbank v. Whitney, 24 Pick. 152; Holland v. Peck, 1 Ired. Eq. 255; Pringley v. Dorsey, 8 S. C. (N. S.) 509; Smith v. Nelson, 18 Vt. 554; Heiss v. Murphy, 40 Wisc. 276; Board of Education v. Edson, 18 Ohio St. 221; Estate of Hinckley, 58 Cal. 512; McCord v. Ochiltree, 8 Blackf. 15; Cruikshank v. Home for the Friendless, 18 Abb. N. C. 282.

The English Courts recognize the *cy pres* doctrine and in the courts of some of the States bequests have been executed *cy pres*. Langford v. Gowland, 9 Jur. (N. S.) 12; Aston v. Wood, 6 L. R. Eq. 419; Pocock v. Attorney-General, 3 L. R. Ch. D. 342; Alchin Trustees, 14 L. R. Eq. 230; Jackson v. Phillips, 14 Allen, 550; Attorney v. Garrison, 101 Mass. 227; Academy v. Clemens, 50 Mo. 167; Goode v. McPherson, 51 Mo. 126; Philadelphia v. Girard, 45 Pa. St. 9.

JONES vs. JONES.

[66 Wisconsin, 810.]

CONSTRUCTION OF A WILL.—LIFE ESTATE WITH POWER OF DISPOSITION.

A will provided as follows: "After my lawful debts are paid and discharged, I give, bequeath, and dispose of as follows, to wit: To my beloved wife, M. J., all that is in my possession at the time of my decease; and also my wife have right to sell the estate, if that will be her choice. And after my wife's decease, the property to be parted to my dear children in equal shares." *Held*, that the widow took, under the will, only an estate for life in the property, with power to sell such life estate, and that the children took, in equal shares, a vested remainder in fee.

APPEAL from the Circuit Court for Dodge County.

George Gary, for appellant.

D. D. Thomas and *I. C. Sloan*, for respondents.

LYON, J. It was said by Chief Justice Marshall, in *Smith v. Bell* (6 Pet. 68), that "the first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in the will shall prevail, provided it be consistent with the rules of law." This rule has been asserted in a variety of forms, and enforced in all courts of this country and England whose decisions are authoritative, and it has never been shaken by adverse rulings.

The case of *Knox v. Knox* (59 Wis. 172) affords an apt illustration of the application of the rule. The will to which construction was given in that case contained this clause: "I give, devise, and bequeath unto my wife, M., her heirs and assigns, forever, all my real and personal estate, . . . having full confidence in my said wife; and hereby request that, at her death she will divide equally . . . between my sons and daughters [naming them] *all the proceeds* of my said property, real and personal, . . . hereby bequeathed." It was held that the precatory words in the will raised a trust in

favor of the testator's children, although none was expressed, and although the devise was to the wife, her heirs and assigns, forever; and that the widow took a life estate in the property, coupled with a trust as to the remainder in favor of the children.

So, in this case, we have but two questions for determination: (1) What intention has the testator expressed in his will in respect to the disposition of his estate? and, (2) His intention being ascertained, is there any existing rule of law which will prevent the court from carrying it out?

1. The disposition which the testator intended to make of his property is made perfectly clear by the terms of his will. First, he gave all his property to his wife. That is the signification of the words "all that is in my possession," employed in the instrument. Then he gave "the property" to his children, necessarily meaning the same property mentioned in the devise and bequest to his wife, to be "parted to"—that is to say, divided between them—in equal shares, after the death of his wife. The provision for his wife contains no word of inheritance, and it is obvious that his children, equally with her, were the objects of his care and bounty. In view of the fact that he employed no language from which an intention to bestow more than a life estate upon his wife can be inferred; the provision which he made for his children shows very clearly that he intended to give her only a life estate.

2. Is there any rule of law which will prevent the court from carrying out and executing the expressed intentions of the testator in respect to the disposition of his property? Counsel for the appellant, who is deservedly eminent for great learning in this branch of the law, maintains that the power of sale contained in the will—"and also my wife have right to sell the estate, if that will be her choice"—authorizes the appellant to dispose of the whole estate of the testator, absolutely, for her own exclusive benefit. That is to say, counsel maintains that the power is general and beneficial, and, the same being unaccompanied by any trust, the life estate of the appellant, the grantee of the power, is changed as to creditors and purchasers into an absolute fee, subject to the future estate

of the testator's children only in case the appellant die without executing the power and the property has not been sold for the satisfaction of her debts. (R. S. ch. 97, secs. 2104-2112.) He argues from these premises that the estate or interest of the children of the testator under the will is, at most, a contingent remainder.

We do not stop to inquire whether this conclusion is properly deducible from the premises, or what would be the effect upon the parties of such a construction of the will, for the reason we do not think the premises are sound. The power of sale may be beneficial, but we are of the opinion that it is not a general power. As already observed, the testator manifestly gave to his children remainder in fee in the same property in which he gave his widow a life estate. There is nothing in the will (aside from the power of sale) from which it can be inferred that he intended to authorize any sale of the *corpus* of his estate; and the language of the power itself does not necessarily raise such an inference. On the contrary, it is quite obvious that he intended his property to go to his children intact, on the determination of the life estate. We cannot believe that by the terms of his will the testator placed it in the power of his widow to sell the property absolutely, and thus put upon his children the risk of her losing the proceeds in unfortunate investments or otherwise. There was nothing in the circumstances of the widow, or the situation of the estate, which called for any such power, and, as already remarked, nothing in the will which ought to be held as conferring it. Hence, we agree with the Circuit Court, that the power of sale only authorizes the appellant to sell her life estate or interest in the property, leaving the property intact for the testator's children when his widow shall decease.

These views take this case out of the rule of *Campbell v. Beaumont* (91 N. Y. 464), and the cases therein cited, much relied upon by counsel for appellant, to the effect that when the property is to be spent by the primary legatee at his pleasure a further limitation is hostile to the nature and intention of the gift, and therefore void. This case is more

nearly like that of *Terry v. Wiggins* (47 N. Y. 512), in which the power of sale, general in terms, was held to be limited to the necessities of the devisee of a life estate, and a remainder over to a religious society was upheld. *Smith v. Bell* (6 Pet. 68), above cited, is a very strong case in the same direction.

We are aware of no other principal of law which forbids a construction of this will as the testator made it. Were the famous rule in *Shelley's Case* (1 Coke, 219) in force in this State, it might defeat the provision for the children of the testator, who, it was admitted by counsel for both parties, are the children of the appellant, his widow, also. We have here, therefore, in substance and legal effect, a devise and bequest to the widow of the testator for life, with remainder to the heirs of her body. That rule is that the words "heirs of her body" are words of limitation, and not of purchase, and the ancestor—the widow of the testator—takes the whole estate. But the rule in *Shelley's Case* is not in force in this State. The opposite doctrine prevails here, and is contained in R. S. sec. 2052, which provides that in such a case the heirs of the body of tenant for life shall take as purchasers by virtue of the remainder limited to them. This saves the remainder, and effectuates the expressed intention of the testator.

The rules for the management and disposition of personal estate bequeathed for life, with remainder over, are laid down in *Golder v. Littlejohn* (30 Wis. 344), and no repetition of them is here required.

The judgment of the Circuit Court is affirmed.

KONVALINKA vs. SCHLEGEL.

[104 New York, 125.]

DOWER.—ELECTION BETWEEN DOWER AND A PROVISION IN THE WILL.—INTENTION.

Dower is not excluded by a provision for the wife of the testator except by express words or necessary implication, nor is the intention to put the widow to an election to be inferred from the extent of the provision, or because she is devisee for life or in fee, or because it seems inequitable to permit her to claim both the provision and the dower.

Where the testator gives the residuum of his estate to his executors, to sell and dispose thereof, and to divide the proceeds equally between his "wife and children, share and share alike," the widow is not thereby put to her election, but is entitled to her dower in addition to such a provision for her in the will.

ACTION for the construction of the will of Schlegel, deceased, upon appeal from the judgment of the Supreme Court. The opinion states the case.

John W. Konvalinka and *Henry McCloskey*, for appellants, citing *Lent v. Howard*, 89 N. Y. 177; *Dodge v. Pond*, 23 Id. 69; *Stagg v. Jackson*, 1 Id. 206; *Moncrief v. Ross*, 50 Id. 431; *Meaking v. Cromwell*, 5 Id. 136; *Hatch v. Bassett*, 52 Id. 359; *Bogert v. Hertell*, 4 Hill, 492; *Graham v. Livingston*, 7 Hun, 11; *Le Fevre v. Toole*, 84 N. Y. 95; *Brink v. Layton*, 2 Redf. R. 79; *Hawley v. James*, 16 Wend. 62-142; *Willard's Eq.*, 713, 715; *Story's Eq.*, § 1075; *Dodge v. Dodge*, 31 Barb. 413; 2 Redf. on Wills, 442; *Vernon v. Vernon*, 53 N. Y. 351, 361; *Provost v. Colyer*, 62 Id. 585; *Bates v. Hillman*, 43 Barb. 645; *Savage v. Burnham*, 17 N. Y. 577; *Tobias v. Ketcham*, 32 Id. 327; *Cook v. Platt*, 98 Id. 35.

W. E. Glover, for respondents, citing *Lent v. Howard*, 89 N. Y. 169; *Chalmers v. Stovil*, 2 Ves. & Bea. 222; 2 How. Pr. N. S. 514; *Cole v. Cole*, 2 Id. 516; *Dickson v. Robinson*, 1 S. & St. 513; *Le Fevre v. Toole*, 84 N. Y. 95-102; *Hatch v. Bassett*, 52 Id. 359; *Moncrief v. Ross*, 50 Id. 431.

George Bliss, for respondents, citing *Lasher v. Lasher*, 13 Barb. 106; *Church v. Bull*, 2 Denio, 430; aff'd, 5 Hill, 206; *Adsit v. Adsit*, 2 Johns. Ch. 448, 452; *Sanford v. Jackson*, 10 Pai. 266; *Tobias v. Ketcham*, 32 N. Y. 319, 325; *Lewis v. Smith*, 9 Id. 502, 511, 521; *Vernon v. Vernon*, 53 Id. 351, 362; *In re Zahrt*, 94 Id. 605; *Leonard v. Steele*, 4 Barb. 20; *Fuller v. Yates*, 8 Paige, 325, 330; *In re Frazer*, 92 N. Y. 239; *Bull v. Church*, 5 Hill, 206; aff'd, 2 Denio, 430; *Jackson v. Churchill*, 7 Cow. 286; *Havens v. Havens*, 1 Sandf. Ch. 324, 329, 331; *Wood v. Wood*, 5 Paige, 596, 599; *Smith v. Kniskern*, 4 Johns. Ch. 9; *Rathbone v. Dyckman*, 3 Paige, 9; *White v. Kane*, 1 How. U. S. 382; *Mills v. Mills*, 28 Barb. 454; *Darson v. Bell*, 1 Keen, 761, 764; *Bending v. Bending*, 3 Kay & J. 257; *Harrison v. Harrison*, 1 Keen, 768; *Foster v. Cook*, 3 Bro. C. C. 347; *Gibson v. Gibson*, 17 Eng. L. & Eq. 349; *Williams v. Freeman*, 98 N. Y. 577; *Ellis v. Lewis*, 3 Hare, 310.

ANDREWS, J. The question is, whether the widow of the testator is put to her election between dower and the provision in the will.

The estate of the testator consisted of both real and personal property. The will, after directing the payment of the testator's debts and funeral expenses, and after giving to his wife the bed-room furniture in his dwelling-house, and to his children the rest of the furniture therein, proceeds as follows: "All the rest, residue and remainder of my estate, property, and effects of every nature, kind, and description, I give, devise, and bequeath to my executors and executrix herein-after named, and I authorize and direct them to sell and dispose of the same at such time and on such terms as to them shall seem best, and to divide the proceeds thereof equally among my wife and children, share and share alike."

There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implication. Where there are no

express words there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement, or even because it may be inferred or believed, in view of all the circumstances, that if the attention of the testator had been drawn to the subject he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will. We cite a few of the cases in this State showing the general principle and the wide range of application. (*Adsit v. Adsit*, 2 J. Ch. 449; *Sanford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Den. 430; *Lewis v. Smith*, 9 N. Y. 502; *Fuller v. Yates*, 8 Paige, 325; *Havens v. Havens*, 1 Sand. Ch. 324, 331; *Wood v. Wood*, 5 Paige, 596.)

In view of these settled rules, we think the widow in this case was not put to her election. The devise to the executors was void as a trust, but valid as a power in trust, for the sale of the lands and a division of the proceeds, and the lands descended to the heirs of the testator, subject to the execution of the power. (1 Rev. Stat. p. 729, § 56; *Cooke v. Platt*, 98 N. Y. 35.) It is strenuously urged that the power of sale being peremptory, worked an equitable conversion of the lands into personalty, as of the time of the testator's death, and created a trust in the executors in the proceeds for the purpose of distribution, which trust, it is alleged, is inconsistent with a claim of dower. The doctrine of equitable

conversion, as the phrase implies, is a fiction of equity which is frequently applied to solve questions as to the validity of trusts; to determine the legal character of the interests of beneficiaries; the devolution of property as between real and personal representatives, and for other purposes. It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property created by a will, and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purposes of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees in order to effectuate the purposes of the testator in creating it, a clear case for an election is presented. (*Vernon v. Vernon*, 53 N. Y. 351.) But the mere creation of a trust for the sale of real property and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to that of the trustee. In the cases of *Savage v. Burnham* (17 N. Y. 561), and *Tobias v. Ketcham* (32 Id. 319), the widow was put to her election, not because the vesting of the title in trustees was *per se* inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter case, which, disconnected with the context, may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed which is mainly to be looked to, because a correct principle is sometimes misapplied. There is, however, no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration. It has frequently been declared that powers of, or in trust for sale, are not inconsistent with the widow's right of dower. (*Gibson v. Gibson*, 17 Eng. L. & Eq. 349; *Bending v. Bending*, 3 Kay & J. 257; *Adsit v. Adsit*, *supra*; *In re Frazer*, 92 N. Y. 239.)

And it was held in *Wood v. Wood* (5 Paige, 596), that the widow was not put to her election where the testator devised all his property to trustees with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached under very similar circumstances in *Fuller v. Yates* (8 Paige, 325), and *In re Frazer* (*supra*), the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of the sale given to the executors was peremptory. The general doctrine is very clearly stated by the Vice-Chancellor in *Ellis v. Lewis* (3 Hare, 310): "I take the law to be clearly settled at this day, that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not *per se* express an intention to devise the lands otherwise than subject to its legal incidents, dower included." This remark of the Vice-Chancellor also answers the claim that the testator, when he described as the subject of the dower "all the rest, residue, and remainder of my estate," meant the entire title, or the estate as enjoyed by him. A similar argument was answered by Lord Thurlow in *Foster v. Cook* (3 Bro. Ch. C. 347). "Because," he said, "the testator gives all his property to the trustees, I am to gather from his having given all he has, that he has given that which he has not." The argument that the testator intended equality of division between his wife and children is also answered by the same consideration. The proceeds of the testator's estate were, by the will, to be equally distributed. It left untouched the dower of the widow, which he could not sell or authorize to be sold, and which was a legal right not derived from him and paramount to all others. It may be conjectured, perhaps reasonably inferred, that the testator really intended the provision for his wife to be exclusive of any other interest, but so it is not written in the will, and we are not permitted to yield any force to the suggestion. It is a question of legal interpretation which has been settled.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

KELLEY vs. VIGAS.

[112 Illinois, 242.]

CONSTRUCTION OF A WILL.—DEVISE TO A CLASS AS "HEIRS AT LAW."

Where a devise is made to a class of persons not named, "as heirs at law" of the testator, so that reference has to be made to the statute to ascertain the persons who constitute his heirs, the provisions of the statute as to the quantity each shall take must also govern. In such case the estate devised will be divided among his heirs, as in cases of intestacy.

APPEAL from the Circuit Court of Greene county, the Hon. Cyrus Epler, Judge, presiding.

Morrison, Whitlock & Lippincott, for appellants.

James R. Ward, for appellees.

SCOTT, J. The bill in this case was brought by a part of the heirs at law of Titus W. Vigas, deceased, against his other heirs, for a partition of the real estate of which the testator died seized. Surviving the death of the testator, were his widow (since deceased), his daughter Jane (intermarried with Milton F. Kelley), and his grandchildren, William Vigas, Titus Vigas, Hattie Vigas, and Josephine Vigas (intermarried with Christopher Doyle), children of his son James Vigas, who departed this life before the death of the testator. Since the death of the testator, his grandson, William Vigas, has died without issue, leaving as his only heirs at law his mother, Sarah F. Vigas, and his brothers and sisters, as above stated. It is alleged in the bill that by the terms of the testator's will Jane Kelley, his only surviving child, would take but one-fifth of the "remainder" of the estate, and that the heirs at law of his deceased son would take the other four-fifths, and the Circuit Court so decreed. Jane Kelley, her husband joining with her, brings the case to this court, and assigns for error that decision of the Circuit Court.

The second clause of the will of Titus W. Vigas, deceased,

which was duly admitted to probate in the county where he had resided, is as follows :

"*Second.* I give, devise, and bequeath unto my beloved wife, Margaret T. Vigas, all my estate, both real and personal property, of whatsoever kind, during her natural life, and at her death, all the property aforesaid to her bequeathed, to my daughter, Jane Kelley, the sum of \$1,000, and to my daughter-in-law, Sarah L. Vigas, wife of James Vigas, deceased, lot No. 258, in Carlin's addition to the town of Carrollton, in the county and State aforesaid, the remainder of my estate to be divided equal among my heirs at law."

The widow, to whom a life estate was given by this provision of the will, has since died, and the question is, how shall the "remainder" of his estate be divided among the "heirs at law" of the testator. After making special devises and bequests, it will be observed, the testator then provides, "the remainder of my estate to be divided equal among my heirs at law." The proof is, the testator left one daughter and four grandchildren his only "heirs at law," and the question is, how do they take the "remainder" of his estate—whether *per stirpes* or *per capita*. Although the will, in this respect, is by no means free from ambiguity, the court is of opinion the heirs take the "remainder" of the testator's estate *per stirpes*. That would give one-half of the "remainder" of the estate to his daughter Jane, and to the heirs at law of James Vigas, deceased, the other half. It will be observed the devise of the remainder of the estate, after the determination of the life estate first created, is to a class of persons—that is, to the "heirs at law" of the testator. To ascertain who are included in the class designated as "heirs at law," reference must be had to the statute of this State regulating descents and distribution of estates. The rule established by the decision of this court in *Richards v. Miller* (62 Ill. 417) is, when the statute is invoked to ascertain the persons who take a devise or bequest by a general description, its provisions as to the quantity each shall take must also be observed. The same doctrine had previously been declared in *Doggett v. Stock* (8 Metc. 450), and in *Tillingast v. Cook* (9 Id. 143). It will be

seen the testator, by his will, disposed of the remainder of his estate to his "heirs at law," but made no devise of it to any one by name, other than designating them as a class. The word "heir," it is said, when uncontrolled by the context, designates the person appointed by law to succeed to the estate in question, as in case of intestacy, and so the authorities seem to hold. Who are heirs of a deceased person is determined and declared by statute, and the quantity each shall take, as *heir*, is also fixed. Observing these rules of construction, it would seem the residue of the estate of the testator should be divided in accordance with the provisions of the statute, as in cases of intestacy. That being so, the heirs at law in this case, under the statute, would take the remainder of the testator's property *per stirpes*, and not *per capita*. This construction accords with what seems to have been the plain intention of the testator. The only doubt as to its correctness arises out of the use of the words "equal among" in the will. It is understood the words "equal among," or "equally," or "share and share alike," when used in a will, mean a division of the estate *per capita*; but this meaning of these words may be controlled by the context, and is often so done. That is the case here. The testator, by making a bequest of money to his own daughter and a devise of land to his daughter-in-law, evidently intended to make an equal division of his estate between his daughter and the family of his deceased son, and it is not unreasonable to believe that was all he meant by the use of the words "equal among." This most just intention ought not to be defeated by giving to the words employed in the will an arbitrary and technical meaning never understood, or perhaps thought of, by the testator when he used them. This construction of the will not only conforms to what is believed to have been the evident intention of the testator, as manifested by the context, but it finds strong support in the previous decisions of this and other courts. (*Richards v. Miller*, 62 Ill. 417; *Bassett v. Granger*, 100 Mass. 348; *Boskin's Appeal*, 3 Pa. St. 304.)

This case may be readily distinguished from *Pitney v. Brown*, 44 Ill. 363. In that case the devise of the residue of

the estate was to devisees by name. Here the devise is to a class of persons designated as "heirs at law." In the former case, the persons to take the estate were specifically named, as well as the quantity each should take. But in the case being considered, reference must be had to the statute to ascertain who are the "heirs at law" of the testator, and when that is done, the rule seems to be that the statute also determines the quantity each heir shall take—as, for instance in *Richards v. Miller (supra)*, the devise was to the "heirs at law" of the testatrix, and by the statute it was ascertained her husband was one of her heirs at law, and by the same statute he took one half of the estate, to the exclusion of the collateral heirs, as in case of intestacy, and it was so decreed.

The decree of the Circuit Court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

MILLS vs. NEWBERRY.

[112 Illinois, 123.]

CONDITION PRECEDENT.—RESIDUARY GIFTS.—PRECATORY WORDS.
—CREATION OF A TRUST BY WORDS OF REQUEST.

Where a legacy is given upon a condition precedent, not performed, the legacy falls into the residue; and when a legacy lapses, there being no residuary bequest, the subject-matter of the legacy will go to the next of kin as estate undisposed of under the will.

Where a bequest is accompanied by words expressing a command, recommendation, entreaty, wish, or hope, on the part of the testator, that the donee will dispose of the property devised, in favor of another, a trust will be created—first, if the words, on the whole, are sufficiently imperative; second, if the subject be sufficiently certain; and third, if the object be also sufficiently certain.

A devise or bequest for a public charitable use is favored in law, and a will giving the same should receive a more liberal construction than will be allowed

in gifts to individuals, and courts of equity have gone great lengths by creating implied or constructive trusts from mere recommendation and precatory words of testators; but in modern times the disposition is to give the words used their natural and ordinary sense, unless it is clear they are used in a peremptory sense.

Where a devise is made in favor of a particular person, with a general intention in favor of a class to be selected by such person, whose duty it is made to execute the power given, the court will not permit the object of the power to suffer by the neglect or refusal of the donee, but will fasten upon the property a trust for the benefit of the class, or carry into effect the testator's general intention. The failure of the particular mode by which the charity is to be effected will not defeat the charity, but equity will substitute another mode to give it effect.

To constitute a valid trust by a devise, three circumstances must concur: sufficient words to raise it, a definite subject, and a certain or ascertained object. If the subject of the charity is not certain, no trust arises. If the words by which the trust is expressed or from which it may be implied, give the first taker the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, the subject can not be considered certain, and a court of equity will not create a trust.

APPEAL from the Appellate Court for the First District. Heard in that court on appeal from the Circuit Court of Cook county.

The will of Julia R. Newberry is in substance as follows:

"*First.* In event I die unmarried, leaving my mother surviving, I devise and bequeath to her all my property, both real and personal, of every kind and nature, upon the express condition, however, that she devise, by will to be executed before receiving this bequest, so much thereof as shall remain undisposed of or unspent at the time of her decease, to such charitable institution for women, in said city of Chicago, as she may select."

The second clause devises her property to her mother and husband, if she should leave both her surviving, in equal shares, upon a like "express condition." The third clause devises the property to her husband, if she should marry and leave him surviving, and no mother, upon the like "express condition." The fourth clause provides, if there is no surviving husband or mother, that all her estate, except jewelry, works of art, books, and wearing apparel, be converted into money, and the income be used to establish a gallery of paint-

ings and works of art in New York, Washington, or Chicago, the preference to be given to Chicago. The excepted articles are devised to her children, if any; if none, to a Miss Tinkham.

The situation at the time of the making of the will was, that Julia Rosa had the income from the estate of her father, Walter L. Newberry, deceased, then amounting to some \$500,000, the principal of which was settled upon her children, if any; and Mrs. Newberry had some \$300,000 personal property from said estate, and a dower estate therein.

Luther Laflin Mills and *Rosenthal & Pence*, for appellant.

Williams & Thompson, for appellees.

Edward S. Isham, for appellee E. W. Blatchford.

Francis Kernan, for appellee Mrs. Newberry.

SHELDON, J. The contingency mentioned in the first clause of the will occurred, and there were none to take under the will other than Mrs. Newberry, the mother, and some charitable institution for women in Chicago. The condition of Mrs. Newberry taking under the will was, that she should, before receiving the bequest to her, execute a will devising, as mentioned, the undisposed or unspent part of the property. This condition we regard a condition precedent. Mrs. Newberry declined to execute the will and perform the condition. She could then take nothing under the will. Where, then, did the property bequeathed to her go? When a legacy is given upon a condition precedent not performed, the legacy falls into the residue; and where a legacy lapses, there being no residuary bequest, it will go to the next of kin as estate undisposed of under the will. (2 Redfield on Wills, 175, 176; *Prescott v. Prescott*, 7 Metc. 141.)

It is insisted that there was, here, a residuary clause; that the whole estate was given to two parties—the mother, and

charity ; that the estate was to go, a certain portion to the mother, the remainder, "so much thereof as shall remain undisposed of and unspent," was to go to charity. That what shall *remain* means the *residuum*, and charity is to take the *residuum*. The remainder here spoken of is by no means tantamount to a residuary clause, which will embrace and carry all that is not disposed of to others by the will. It is a remainder which embraces but that which shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry. It is something which may never be, and if it ever shall arise, it will only be upon such decease.

It is urged, again, that by the doctrine of *acceleration*, charity is immediately entitled to the whole of the estate—such doctrine being, that if there is a gift to one person for life, and after his death to another, if the first one is incapable of taking, or if he refuses to take, the remainder is accelerated. Although the ulterior devise, in terms, is not to take effect in possession until the decease of the prior devisee, if tenant for life, yet, in point of fact, it is to be read as a limitation of the remainder, to take effect in every event which removes the prior estate out of the way. (Theobald on Construction of Wills, 450 ; 1 Jarman on Wills (5th Am. ed.), 574 ; *Blatchford v. Newberry*, 99 Ill. 11.)

It is said the whole estate, here, was given to two parties, the mother and charity, in succession ; that it was not intended that any part of the estate should become intestate, or that the next of kin, as such, should receive anything, and that the intention was, that when the estate of one party ceased, that of the other should commence in possession ; that such is the result, here, under the rule of acceleration, and that the court should ascertain the special object of charity, and order the whole fund paid over at once by Mrs. Newberry to such object. What here stood in the way of anything going over to charity, was the enjoyment of this property by Mrs. Newberry, with the right of expending and disposing of it until the time of her decease. This prior estate has not been removed out of the way—it has not gone or would not go over to any other person, but is in the rightful possession and use of Mrs. New-

berry, with full capacity of spending and disposing of it. True, the enjoyment of the property by her is not under the will, as devisee, but under the law, as next of kin. But what difference should that make? The technicality of *how* the mother enjoyed—whether *as devisee or next of kin*—the testatrix could have cared nothing for. The thing substantial was the use and enjoyment of the property for life. As next of kin, Mrs. Newberry enjoys the use of the property, and the right of expending and disposing of it, just the same as she would have done had she executed the will as required by the first clause. All that has happened is, that Mrs. Newberry has refused to perform the condition—to execute the will. But that in no way interrupts her use and enjoyment of the property. What was to go over to charity was not that which remained undisposed of or unspent at the time of refusing to perform the condition or to take under the will, but it was so much as should remain undisposed of or unspent at the time of Mrs. Newberry's decease. She was to have the use and enjoyment of the property, with the power of disposing of it, so long as she lived. The refusing to perform the condition can not be taken as the equivalent of her death. Had anything occurred to cause inability afterward to make any use of the property and to expend or dispose of it, that, with some reason, might be urged as such equivalent, and as accelerating the enjoyment by the ulterior object of bounty. The rule of acceleration is applied in supposed fulfillment of the testator's intention. The paramount intention appearing in this will is, that the mother should have the possession, use, enjoyment, and disposition of the whole of this property so long as she lived. The interest of charity was quite subordinate in the testatrix's consideration, and it was but the undisposed of and unspent remnant remaining at the end of life. It would be doing the greatest violence to the intention disclosed in the will to hand all the property over to charity upon the mother declining to execute the will mentioned in the condition, and in our opinion there is no legal principle which so requires. There being no residuary clause in the will, upon non-performance of the condition precedent the property went over

to the next of kin, and the executor rightly distributed the same to Mrs. Newberry, as such next of kin.

Taking this as being so, it is then contended for appellant, that it was but the legal title to the property which went to Mrs. Newberry, and that there was a trust in favor of charity attached to the property in her hands, created by the words of the condition in the first clause. We agree, in the main, with what is urged by appellant's counsel upon this branch of the cause, except in its application in this case. It has been established from a series of cases, that where a bequest, accompanied by words expressing a command, recommendation, entreaty, wish, or hope, on the part of a testator, that the donee will dispose of the property in favor of another, a trust will be created—first, if the words, on the whole, are sufficiently imperative; second, if the subject be sufficiently certain; and third, if the object be also sufficiently certain. (Hill on Trustees, 110.) Such a charity as here is favored in law, and will receive a more liberal construction than will be allowed in gifts to individuals. As is said by Story: "In the interpretation of the language of wills, courts of equity have gone great lengths, by creating implied or constructive trusts from mere recommendatory and precatory words of the testator." (2 Story's Eq. Jur. § 1068.) But as said further, in § 1069: "In more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." There is in this case more than the expression of mere recommendation, confidence, hope, wish, and desire that the remainder left of the property should go to charity. It is made an express condition that the devisee, before receiving the bequest to her, shall devise, by will to be executed by her, such remainder to charity. The language is of a peremptory and imperative nature, expressive of the testatrix's intention which she wills to be performed, answering the description of a will, as legally defined: "The legal declaration of a man's intentions, which

he wills to be performed after his death." (2 Blackstone's Com. 499.)

We think the language of this condition fully sufficient to create a trust with respect to such property as may be the subject of a trust. And we do not feel any difficulty in respect to uncertainty of the object of the bounty to charity, or in respect to the necessity of a will from Mrs. Newberry in order to carry the subject of the bounty. Although the condition reads that Mrs. Newberry should devise, by will, the undisposed of or unspent part of the property to such charitable institution for women, in the city of Chicago, as she might select, we do not deem it of the essence that Mrs. Newberry should have made the will or the selection. There is here expressed a general intention in favor of charities for women, in Chicago, and a power given to Mrs. Newberry to select the particular object of charity; but her failure to make the selection the court will not allow to disappoint the beneficiaries, but will carry into effect the general intention in favor of the class, and will itself execute the power to select the particular object of charity. As observed by Mr. Perry, in his work on Trusts, (vol. 1, § 250), Lord Cottenham, in *Burroughs v. Philcox* (5 M. & C. 72), stated the general rule deduced from the cases, as follows: "When there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises as stated by Lord Eldon in *Brown v. Higgs* (8 Ves. 574), of the power being so given as to make it the duty of the donee to execute it; and in such case the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit." It was said by this court in *Heuser v. Harris* (42 Ill. 435): "The opinions in the cases of *Maggridge v. Thackwell* (7 Ves.) and *Mills v. Farmer* (1 Merri- vale), were by Lord Eldon, and resulted in this, that if a testator has manifested a general intention to give to charity,

the failure of the particular mode by which the charity is to be effected will not destroy the charity, for, the substantial intention being charity, equity will substitute another mode of devoting the property to charitable purposes, although the formal intention as to the mode can not be accomplished." (And see 2 Story's Eq. Jur. § 1167.)

But an insuperable difficulty which we find to be in the way of the present proceeding, is the uncertainty as to the subject-matter of the trust attempted to be asserted. The subject is, so much of the property as shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry. The property having been previously given to her absolutely, we construe the above as giving her the full power of expenditure and disposition of the property during her lifetime. What, then, is there to which a trust can now attach?—which a court of equity can now take hold of and administer as trust estate? Evidently nothing. It is not the whole property, nor is it any particular part of it, for it all must remain with Mrs. Newberry so long as she lives, for her to spend and dispose of. There may, or there may not, be something remaining undisposed of or unspent by her, at the time of her decease. Whether anything at all will be so left, is now entirely uncertain. The authorities fully establish that the subject-matter of the supposed trust must be certain. "To constitute a valid trust, undoubtedly three circumstances must concur: sufficient words to raise it, a definite subject, and a certain or ascertained object." (Sir Wm. Grant in *Cruwys v. Colman*, 9 Ves. 323.) "I do not lay it down that in a will a request may not amount to a legacy, but it should be limited to some certain thing or for some certain part of a thing, and not left absolutely to the pleasure of the person to whom the request is made." (Lord Hardwicke in *Bland v. Bland*, 3 Cox, 355.) In the language of Story: "Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion or choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership—in all such cases courts

of equity will not create a trust from words of this character." (2 Story's Eq. Jur. § 1070.) The rule, which we believe to be amply supported by the authorities, is thus laid down in Hill on Trustees (119): "But any words by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, will prevent the subject of the gift from being considered certain." (See, also, *Knight v. Knight*, 3 Beav. 173; *Howard v. Carusi*, 109 U. S. 725; 2 Pomeroy's Eq. Jur. § 1014-1017; *Williams v. Worthington*, 49 Md. 572.)

We do not consider, as indicated in the earlier part of this opinion, that the uncertainty in the subject has been removed by the refusal of Mrs. Newberry to perform the condition.

It is suggested that the true construction of the words, "remain undisposed of and unspent," means that the *whole* estate of the *testatrix*, *Julia Rosa Newberry*—that which remained undisposed of and unspent by the *testatrix*—should go over to charity upon the death of *Mrs. Newberry*, who should be held simply a trustee of the fund. We can not think this to be the correct construction, but that the clear meaning is, that it was the remnant of the property remaining "undisposed of and unspent" by *Mrs. Newberry* at the time of her decease, which was to go over to charity.

We find that the condition in question fails in the condition of certainty as to the subject, essential to the creation of a trust, by the words used, and we hold, at least, that the present proceeding is premature, in there being no subject *now* existing to which a trust can attach, and in respect whereof the interference of a Court of Chancery can be called for or exercised.

The judgment of the Appellate Court must be affirmed.
Judgment affirmed.

MULKEY, J. I concur in the conclusion reached in this case, and in most that is said in the opinion of the majority of the court, but not in all. In so far as the opinion seems to hold the *testatrix's* intention in respect to the rights of the

mother under the will is to be given effect just as though there had been no renouncement of it, and that for this purpose it is immaterial whether she takes under the will or by intestacy, I am unable to concur. This seems to me to be making the will speak and not speak, at the same time. The will may still be looked to for the purpose of determining whether, notwithstanding her renunciation, anything is given to charity, and if so, what it is. The intentions of the testatrix in respect to the mother are based upon the hypothesis that she would accept the provision made for her, as made; but this intention she has defeated by her renunciation. As I view the matter, when Mrs. Newberry renounced the will all her rights under it at once ceased, and her relation to the property bequeathed to her became precisely the same as if no bequest had been made to her at all. Her renunciation is just as fatal to and destructive of the testatrix's intention and purposes in her behalf, as it is to the bequest itself. As next of kin to her deceased daughter, she takes the property without regard to any condition or provision in the will relating to her, and, as is conceded by all, with absolute power of sale and disposition for her own account. Such being the case, I see nothing to which a trust in favor of charity can now, or at any future time, attach. I can not, therefore, concur in the view which the majority opinion seems to hold, that if, upon Mrs. Newberry's death, any of the property shall remain undisposed of, it will, under the will, belong to charity. All the authorities agree that a testamentary trust, to be valid, must be limited to some certain thing, and this certainty as to the subject of the trust must appear from the will itself when it first speaks—namely, at the death of the testator. As is well said by Sir Wm. Grant, in *Cruwys v. Colman* (9 Ves. 323), it can not be "left absolutely at the pleasure of the person to whom the bequest was made"—the very thing which was attempted to be done here. What is the subject of the trust in this case? Is it the whole, half, tenth, hundredth, or thousandth part of the property bequeathed to Mrs. Newberry, or is it anything at all? It is conceded by the majority of the court that it may turn out to be nothing. Thus it is said:

"It is something which may never be." A gift to charity may well be postponed to a future day, or it may be made to depend upon some contingency that may, or may not, happen. But in all these cases the subject of the trust, whether it be land, money, or other chattels, must be so definitely pointed out and described by the instrument creating the trust, that a court of equity may protect it and preserve it intact for the use and benefit of the objects of the gift.

In determining whether anything is given to charity in this case, I think, with the majority of the court, the will must be construed in the same manner it would be if the devise had been made to Mrs. Newberry unconditionally, giving her, as it did, an absolute power of user and disposition on her own account, and had then contained a provision directing her, by her last will and testament, to devise whatever might remain of the bequest to her, if anything, to charity, as indicated in the present will. Looking at the will in this light, it does seem to me there is no ground for controversy. The subject of the devise in this case is personal property, with the exception, perhaps, of one piece of land lying in a sister State. So far as the land is concerned, the rule applicable to such a devise is well stated in 2 Jarman on Wills (5th Am. ed. p. 528). It is there said: "A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A. and his heirs, upon condition that he shall not alien them, or charge them with any annuity, the condition is void." And on the next page the author adds: "So, if lands be devised to A. and his heirs, with a gift over if he die intestate or *shall not part with the property in his lifetime*, the gift over is repugnant and void." (See, also, vol. 1, page 653, where the same doctrine is laid down in strong and emphatic terms.) If such be the rule in respect to real property, no argument or authority is necessary to show that it applies with greater strictness to personal estate. While, in equity, a life estate may be given in money or other chattels whose use does not consist solely in their consumption, yet no rule of law is regarded more elementary or better settled than that any limitation over or condition affecting the right of user or dis-

position after an absolute and unqualified gift of personal property, whether in a will or deed, is repugnant and inconsistent with the gift itself, and is therefore void. (*Watkins v. Williams*, 3 Mac. & Gord. *628; *Ross v. Ross*, 1 J. & W. 154; *Cuthbert v. Peumer*, Jac. 415; 2 Redfield on Wills, par. 19, § 24, chap. 3.)

Without stopping to discuss what may be regarded as limitations or exceptions to the above general rule, as applicable to either real or personal property, I assert, with the utmost confidence, that no respectable authority has been or can be produced that takes the present case out of the general rule as above stated. The present case is but another of the many instances with which the books abound, where one, after having made an absolute gift of property, has attempted to control its future disposition or use—a thing which the law does not allow, as has been held, perhaps, a thousand times.

I am therefore of opinion the so-called bequest to charity is *ab initio* inoperative and void, on both the grounds stated.

DIOKEY, J. I think the subject of the attempted gift to charity is so uncertain as to render that provision void. I am also inclined to think the object of the attempted gift is not sufficiently certain to render the same effective. I think the heir takes the property free from the alleged trust for charity.

JOHNSON vs. JOHNSON.

[106 Indiana, 475.]

ATTESTATION OF WITNESSES.—AT THE SAME TIME OR IN EACH OTHER'S PRESENCE.

Under the statute of Indiana it is not necessary that the subscribing witnesses to a will shall attest it at the same time and in the presence of each other.

APPEAL from a judgment of the Circuit Court of Vigo county. The opinion states the case.

C. F. McNutt, J. G. McNutt, S. C. Davis and S. B. Davis, for appellants.

B. E. Rhoads, W. Mack, W. Eggleston and E. Reed, for appellee.

ELLIOTT, J. The will of Cornelius Johnson, which is here the subject of controversy, was written and signed by the testator in August, 1858, and was then attested by one of the subscribing witnesses, Daniel Budd, but it was not attested by the other subscribing witness, James Ray, until the following December, when he signed as a witness at the testator's request. The contention of the appellant is that the subscribing witnesses should have attested the will at the same time, and this presents the pivotal question in the case.

It was the common law, until the change made by express statute in 1837, that it was not necessary that the subscribing witnesses should attest the will at the same time, or in each other's presence. (*Jones v. Lake*, 2 Atk. 176 n.; *Ellis v. Smith*, 1 Vesey, Jr., 11; *White v. Trustees of British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Jauncey v. Thorne*, 2 Barb. Ch. 40.)

This rule was changed by statute enacted in 1837, which requires that the will shall be simultaneously attested by the witnesses. (1 Jarman Wills [5th Am. ed.], 254.) Our statute does not in express terms require that the witnesses shall subscribe the will at the same time, but is similar to the English statute as it existed prior to the change made in 1837, and the well settled rule that a statute taken from another country shall be deemed to carry with it the construction placed upon it by the courts of that country, would seem to make it clear that it is our duty to adopt the construction given the statute by the English courts. If we yield to this principle, then we must hold that it is not necessary that the witnesses should simultaneously subscribe their names to the attesting clause of the will. This view is well supported by authority. Follow-

ing the decision in *Hoysradt v. Kingman* (22 N. Y. 372), it was decided in *Barry v. Brown* (2 Dem. [N. Y.] 309), that, "It is an unimportant circumstance that this acknowledgment and publication were made to the witnesses on different occasions, and when they were apart from each other." In speaking of a statute very similar to ours it was said by the Supreme Court of Connecticut, that, "The language of our statute existing when this will was made is explicit and entirely free from ambiguity. It only requires that all the witnesses shall subscribe their names in the presence of the testator. It would give to it a strained and unnatural interpretation to extend it so as to require them all to sign in the presence of each other." (*Gaylor's Appeal*, 43 Conn. 82.) A similar ruling was made by the Supreme Court of Massachusetts, in *Dewey v. Dewey* (1 Met. 349), and in *Hogan v. Grosvenor* (10 Met. 54).

The statute of Wisconsin is essentially the same as ours, and in speaking of it the Supreme Court of that State said: "It only requires that the will shall be 'attested and subscribed in the presence of the testator by two or more competent witnesses.' (R. S. 650, section 2282.) So far as we are aware, the cases on this subject arising under statutes similar to ours (many of which are cited in the brief of counsel for the appellant), uniformly hold that the witnesses need not attest and subscribe the will in the presence of each other. To hold otherwise would be to interpolate a provision in the statute which the Legislature has not written there, and which cannot properly be implied from anything which is written." (*Will of J. B. Smith*, 52 Wis. 543 [38 Am. R. 756]).

Without commenting further upon the authorities, we refer to some of them, merely remarking that they will be found to fully sustain the rulings made in the cases already referred to by us. (*Hoffman v. Hoffman*, 26 Ala. 535; *Flinn v. Owen*, 58 Ill. 111; *Rogers v. Diamond*, 13 Ark. 474; *Cravens v. Faulconer*, 28 Mo. 19; 2 Greenleaf Ev. § 676; 1 Redfield Wills, 219.)

The appellant relies on two cases in our own reports—*Patterson v. Ransom*, 55 Ind. 402, and *Potts v. Felton*, 70 Ind. 166—but in neither of these cases was the point decided.

In the first of these cases, there was some discussion of the question, but the case was decided upon another point, the court saying: "If the case turned upon this point, we should feel under the necessity of examining the authorities closely before deciding that such attestation would be a compliance with the statute." In the second case cited, the case turned upon an entirely different proposition of law from the one here involved, and, of course, that decision is not of controlling force here.

We fully agree with the appellant's counsel, that a will must be executed in conformity with the statute. *Patterson v. Ransom*, *supra*; *Herbert v. Berrier*, 81 Ind. 1, see p. 2; *In the Matter of Probate of Will of Hewitt*, 91 N. Y. 261.) But while we agree with counsel upon this proposition, we cannot concur with them that the will before us was not executed and attested as the statute requires.

Judgment affirmed.

BRISTOL vs. BRISTOL.

[53 Connecticut, 242.]

BEQUEST TO CHARITABLE USES.—TRUSTS.—UNCERTAINTY.

A bequest as follows: "I authorize my executrix to disburse from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars," is invalid, being neither the creation of a trust, nor a gift to the executrix, and a bequest in the following language: "I authorize, empower and direct my wife to permanently dispose of the same" [twenty-five dollars per annum, the income of a certain fund] "for such charitable purposes as she may deem proper," is void for uncertainty.

SUIT for the construction of a will.

J. K. & J. S. Beach, for plaintiff.

J. Halsey and *A. Brandagee*, for the heir at law.

C. R. Ingersoll, for the charitable societies.

LOOMIS, J. This case involves the construction of two clauses in the will of Julius D. Bristol and the question of their legality.

The eleventh clause of the will is as follows :

"I hereby authorize and empower my executrix to disburse and give (in furtherance of my wishes expressed to her at sundry times) from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all the total sum of five thousand dollars."

Is this a valid gift? It clearly is not a trust. There is no person or object named, or even hinted, as the *cestui que trust*. There is no person who could claim in a court of equity an enforcement of the trust. It is a case where, if the five thousand dollars had been given to the executrix to be disposed of at her pleasure, the law would regard the property given as vested in her, while the direction for its use was merely precatory and of no legal force. In such a case the law regards the legatee as taking the gift absolutely and with no enforceable duty as to its use.

But there is no gift to the executrix. She has merely a power of distribution. Nothing vests in her. It is precisely as if no disposition whatever of the fund had been suggested, but the executrix had been empowered to direct how five thousand dollars of the estate should go. It is, in other words, an authority given to a third person to direct how a part of the testator's property should be disposed of. If good for a part of the estate it would be good for the whole. Would, then, a will in the following words be a valid one: "I direct that A. B. shall declare how all my property shall be disposed of."

The supporters of this will say that such a will would be valid, and quote in support of their claim a dictum of Judge Seymour in *Wait v. Huntington* (40 Conn. 11), as follows: "It is a familiar law that a testator may confer on executors and on others an absolute power of appointment and disposition over his property." But the case itself did not call for this remark, nor involve the question of its correctness, and it

seems hardly probable that the learned judge intended that it should have the wide application given it.

There is a singular absence of all reference to this question in the text-books, and we have found no decisions that bear with any directness upon it. In the absence of such authority we should regard such a will as of no legal effect. We think the law never intended to accept as a valid will so vague and indefinite a direction, such a mere authority. It is in no proper sense a will. It indicates no intent whatever on the part of the testator as to the disposition of his property. It is really a public declaration that he has no such intent. It is a travesty of terms to call such an instrument a will.

The bequest being inoperative, the five thousand dollars appropriated by it falls into the residue. This is the well-settled rule in the case of void bequests of personal property. (*Greene v. Dennis*, 6 Conn. 292; *Thayer v. Wellington*, 9 Allen, 295; *James v. James*, 4 Paige, 115.)

The remaining question arises under the twelfth clause of the will, which is as follows:

"I give and bequeath all the rest and residue of my estate of every name and nature whatever and wherever the same may be situated, unto William T. Bartlett and Edward A. Chatfield, both of the city and county of New Haven, and Edward W. Twitchell of Southington, Connecticut, and their successors to be designated and appointed as hereinafter set forth, as a board of trustees, to hold, invest, reinvest, manage and preserve as a permanent fund, in trust for the uses and purposes, and subject to the directions by me herein set forth and for the objects herein indicated, which fund shall be called The J. D. Bristol Benevolent Fund of Southington, Connecticut, and the object of the trust is to provide a permanent fund with a perpetual income from which income shall be paid the annuities hereinafter given and set forth."

The testator then gives one hundred dollars a year from the income of the fund to Emeline Cook, during her natural life, and directs that from the remainder of the income there shall

be paid one-half to the New Haven Orphan Asylum, one-eighth to the Home of the Friendless in New Haven, one-eighth to the Connecticut Humane Society, and the remaining quarter he disposes of by the following clause :

“ And I do hereby authorize, empower and direct my beloved wife, Martha Amelia Bristol, to permanently dispose of, for such charitable purposes as she may deem proper, the other one-fourth of said remaining interest, income and profit accruing from such permanent trust fund.”

It is very clear that this is not a gift to the wife herself, which she can take discharged of the trust, as it merely gives her a power to appoint the charitable use. Is it then valid as a gift to charitable uses under our statute on that subject ?

Whatever might be held on this question by the courts of England, or of those States which have adopted the English doctrine on the subject, it is very clear that under our own decisions, which have established a definite rule on the subject in this State, this bequest cannot be held valid. It is well established with us that a gift to a charitable use must designate the particular charitable use by making the gift to some charitable corporation, whose charter provides for a charitable use of its funds, or to some particular object or purpose that the law recognizes as charitable. It is enough if the object be mentioned, and the law can see that it is a charitable one ; but it is not enough that the gift be merely “ to charitable uses ” or “ to be used in charity,” so long as no selection is made from the long list of recognized charitable objects. And it is not enough that some person is named to whom is given the power of naming the charity. That is the testator’s own matter. It is his intent that is to determine that. If he chooses to leave the matter wholly to the discretion of some person named, he can do so by making the gift to him, leaving him to use his discretion as to the disposition of it. In this case the donee takes absolutely, and the law does not trouble itself as to whether he acts conscientiously in the matter. The testator has chosen to leave the matter to uncertainty and there the law leaves it.

The charitable object, thus required to be named, may be a

benefit to a class of persons and therefore uncertain as to the particular persons of the class that are to receive the benefit. This uncertainty may make the bequest void, unless there is a power given to some person or corporation to make a selection of the individuals. (*White v. Fisk*, 22 Conn. 50; *Adye v. Smith*, 44 Id. 70; *Fairfield v. Lawson*, 50 Id. 513; *Coit v. Comstock*, 51 Id. 379; *Tappan's Appeal from Probate*, 52 Id. 412.) Here the power given the widow is not to select the particular beneficiaries of a class named, but to select the charity itself. We think that, to uphold this bequest, we should have to go beyond the utmost limit to which we have gone in upholding charitable gifts.

The bequest being of such a character, it clearly can not be saved by the act of the widow in making a written designation of the charitable purposes which by it she is authorized to select.

If this gift can not be sustained, then it is claimed that the entire trust fund falls with it.

But the principle to be applied is well settled, that where a trust is for several purposes, some valid and some invalid, it will be supported so far as it is good, provided such part is separable from the rest and no violence will thereby be done to the testator's general intent. (3 Jarman on Wills [Am. ed.], 709; 1 Redfield on Wills, 428; *Sears v. Putnam*, 102 Mass. 9; *Benedict v. Webb*, 98 N. Y. 460.) But the case of *Coit v. Comstock* (51 Conn. 352) was cited in argument to show that the trust was inseparable. In that case, however, the annual income of the trust fund was to be expended, so much as might be necessary, in putting and keeping in good order certain burial lots and monuments, and the remainder for the support of religious services in connection with the ecclesiastical society that was named as trustee. The bequest for the care of the burial lots was invalid, but it was not separable for the reason that it was impossible to tell how much of the income would be required for the burial lots or that it might not take the whole and leave nothing to be applied to the valid charity.

In the case at bar it is admitted that if the residue were

given, in different portions, to different objects, each would be independent of the others, and a failure of any one of them would not affect the others. But it is said that here the gift is of different portions of the *income* only, so that the shares, being shares only of a common income, can not be severed in advance, or in any other way except by a division of the income. The question raised here is not without practical difficulty. It is, of course, out of the question that the quarter of the income should *in perpetuo* be distributed to the heirs at law. If the quarter is set apart for them at all, it clearly must be in the principal. The testator, whose intent is to govern so far as practicable, clearly intended that the benefit of three-quarters of the fund should go to the charitable institutions named. This plain intent clearly should not be allowed to fail if there is any way by which the quarter share of the heirs at law in the income can be severed from the rest. This can only be done by a division of the principal of the fund, setting aside for distribution as intestate estate one-quarter of it, and preserving the other three-quarters for the trust fund. This can do no possible injustice to any party interested, unless the part set to the heirs should increase in value, making the income from it larger in proportion than that from the trust fund, in which case the charitable institutions would be losers; or unless the trust fund should increase disproportionately in value, making a corresponding loss to the heirs at law. But the loss or gain on either side would probably be very small, while the chances are equal, and the advantage to both the trust fund and the heirs in thus severing their interest would be very great.

The matter stands at this point precisely as it would if a testator should direct that his property go into the hands of trustees and the income be divided into ten equal parts and paid over annually to "the following charitable corporations, one part to each;" and should then by mistake name only nine charitable corporations, leaving the tenth part undisposed of and therefore intestate. Now, must all these nine charitable bequests, all legal in themselves, fail, simply for this oversight? The testator's one great intent was to give his

property in charity, and not to give a dollar to his heirs, who were, perhaps, remote collaterals. Shall this great intent wholly fail, and the other non-intent completely succeed? This would be doing great injustice to the testator and great despite to his intent. What is the technical difficulty? Simply this—that if the fund is at once divided into ten parts and one part given to the heirs at law, these heirs may not get an exact tenth, or the other nine-tenths may some time or other yield more than nine-tenths of the income. If they yield less that is of course the loss of the charitable societies; but that is of no consequence, as they do not complain. The only complaint is from the heirs at law—that they may not get the full tenth. But the heirs have this advantage—they get their tenth of the fund down, at once, and at market value; so that they can at once turn it into money if they choose; while the other nine-tenths are to be kept a long time and may in part be lost or reduced in value. In the whole matter the heirs have the advantage.

Now, can it be that this small risk—not only very small, but very remote and merely speculative—is to be allowed to defeat the great prevailing, manifest, legal intent of the testator, and that, too, in favor of heirs at law to whom it was his clear intention to give nothing? Such a result would seem to be a reproach to the law.

It is true that this is a division of the principal, while the testator, in the case we are supposing, intended only a division of the income. But it is well settled that an absolute gift of all the income of property is a gift of the property itself. The donor in such a case retains nothing, and gives no interest to any other person than the donee. In the case before us the departure from the exact intent of the testator is only as to the mode of carrying out his cherished object, not a substitution of one object for another. There is nothing of the *cy pres* doctrine in it.

We think, therefore, that one quarter of the residue now devoted to the trust fund should, upon a fair estimate of values, be separated from the trust fund and distributed as intestate estate to the heirs at law.

A question of some practical difficulty arises with regard to the annuity of one hundred dollars in favor of Emeline Cook, which is charged for her life upon the entire trust fund. It is clear that the reduced trust fund should pay but three-quarters of this and that the other quarter should be paid from the quarter of the residue that goes to the heirs. This annuity is charged upon the whole residue and therefore as much upon the quarter that goes to the heirs as upon the three-quarters that goes to the trust fund. Unless the parties agree upon some arrangement that shall dispose of this small charge, the trustees should retain, either the whole of the residue until Mrs. Cook's death, or an ample amount from the quarter distributed to the heirs to yield with certainty the sum of twenty-five dollars per year, the same to be distributed to the heirs at law upon the death of Mrs. Cook.

The claim is made in behalf of the charitable institutions taking under the residuary clause, that this quarter of the income, or of the principal if we so treat it, upon the legacy in question failing, goes into the residue, thus preserving the trust fund unimpaired and increasing their beneficial interest under it. But this clearly cannot be so. The residue spoken of in the will is the residue after the payment of the preceding bequests, and clearly cannot, either in law or reason, take back into itself a part of the residue itself that has dropped out by not having been legally disposed of. It necessarily becomes intestate estate.

CARPENTER and STODDARD, JJ., dissented from so much of the opinion as held the bequest of the fourth of the income of the trust fund to charitable purposes to be designated by the widow invalid, but concurred in holding that the bequest of the other three-fourths of the income to the charitable societies named was valid.

PARK, C. J., and GRANGER, J., dissented as to the validity of the bequest of the remaining three-fourths of the income of the trust fund.

All the judges concurred in the opinion except as to the points of dissent noted.

Of Devises and Bequests to Charitable Uses.—In order that a corporation may act as trustee to hold property for charitable uses, it is necessary to show not only its corporate existence, but that by virtue of the corporate powers, conferred upon it by its charter, it is authorized to hold property in trust for others. The trustee must be capable of taking a legal estate. 1 Swift's Syst. 225; Burr's Ex'rs v. Smith, 7 Vern. 241; King v. Woodhull, 3 Edw. Ch. 79; Boutelle et al. v. Cowdin, 9 Mass. Rep. 254; Jackson d. Cooper et al. v. Cory, 8 Johns. 385; Barker v. Wood, 9 Mass. 419; Lockwood v. Weed, 2 Conn. 287; Gibson v. McCall, 1 Richardson, 174; Potter v. Chapin, 6 Paige, 639; Lefevre v. Lefevre et al., 59 N. Y. 334; Leonard et al. v. Bell et al., 58 Id. 676; Kerr et al. v. Dougherty et al., 79 Id. 227; Hollis v. Drew Theological Seminary et al., 95 Id. 166.

However, a devise to specified trustees, to be held in trust to charitable uses, even where the corporation by the terms of its charter is not capable of holding land, although void at law, has been sustained in equity when the intent of the testator could be carried out without violating any of the provisions of the statute or any principles of law. Attorney-General v. Combe, 2 Ch. Cas. 18; Mills v. Farmer, 1 Meriv. 55; Beekman v. Bonsor, 28 N. Y. 302; Bash v. Bash, 9 Pa. St. 260; Dodge et al. v. Williams et ano. Ex'rs, &c. et al., 46 Wisc. 70.

Where the trust is to a charitable use, but the language of the bequest is so vague, or the objects so indefinite, that the intention of the testator cannot be ascertained, the trust will fail for uncertainty. 43 Elizabeth, ch. 4; Taylor v. Soyer, Cro. Eliz. 742; Anon., 1 P. Wms. 327; Morice v. Bishop of Durham, 9 Ves. 329; The Baptist Association v. Hart's Ex'rs, 4 Wheaton, 29; Dashiell et al. v. Attorney-General, 5 H. & J. 392; Wildeman v. The Mayor and City Council of Baltimore, 8 Md. 555; Harris v. Clark, 3 Seldon, 242; Coster v. Lorillard, 14 W. R. 265; Holmes et al. v. Mead et al., 53 N. Y. 332; Kain v. Gibboney, 101 U. S. 362; Rizer et al. v. Perry et al., 58 Md. 112; Luques v. Dresden, 77 Me. 186; Dodge et al. v. Williams et ano. Ex'rs, &c. et al., 46 Wisc. 70.

As a rule, the doctrine of *cy pres* is not applied in the United States in disposing and apportioning bequests to charitable uses. The courts sustain charities within the strict limits of chancery jurisdiction, and do not exercise the prerogative power. Perry on Trusts, § 722; Hayter v. Trego, 5 Russ. 113; Morggredge v. Thackwell, 7 Ves. 86; Denyer v. Druse, Tamlyn, 32; Reeve v. Attorney-General, 3 Hare, 191; Inglis v. Sailors' Snug Harbor, 3 Pet. 99; Ould v. Washington Hospital, 5 Otto, 303; Fellows v. Miner, 119 Mass. 541; Williams v. Pearson, 38 Ala. N. S. 299.

In some of the States where there is placed upon the courts all the judicial power with respect to charities, the power of *cy pres*, is included so far as it may be employed in directing trustees named in a will or deed

to carry into effect the general lawful and charitable intent, when the particular scheme is impracticable or has become unlawful. *Estate of Hinckley*, 58 Cal. 512.

The rule in reference to perpetuities does not apply to charities, and a limitation over to another charity is good when dependent upon a contingency which may take place within the limit of the rule. *Jones v. Hoberham*, 107 U. S. 174.

And where the charity does not exist at the date of the gift, and the beginning of such charity is dependent upon a contingency which may or may not happen within the limit of the rule, the trust is good provided there is no gift of the property in the meanwhile to any private corporation or person. *Russell v. Allen*, 107 U. S. 168.

CLINE vs. JONES.

[111 Illinois, 563.]

DISTINCTION BETWEEN A DEED AND A WILL.

A testamentary disposition of property is ambulatory until the death of the testator, when it takes effect; but a deed for an interest in land must take effect upon its execution or not at all. A party cannot make a deed for land and retain its custody, and have it operate as a conveyance only after his death. It takes effect at once or not at all.

A conveyance of land or a deed may be good as a voluntary settlement however, though it be retained by the grantor in his possession until his death, when the circumstances, aside from the retention of the deed, do not show the grantor did not intend it to operate immediately.

APPEAL from the Circuit Court of Sangamon county; the Hon. Charles S. Zane, Judge, presiding.

N. M. Broadwell and *Gross & Zane*, for appellants.

McGuire & Salzenstein, for appellee Matilda Jones.

Patton & Hamilton, for appellee Mrs. Sayles.

SHELDON, J. This was a bill filed by William Cline and others, against Matilda Jones and others, for partition of certain lands described in the bill, derived from a common ancestor, John Cline. Matilda Jones filed her answer denying that complainants were entitled to partition of a certain three-acre tract of the lands, claiming sole ownership thereof in herself, by virtue of a deed of conveyance of the same made to her by John Cline on the 19th day of February, 1879. Replication was filed, proofs taken, and the court found the defendant Matilda Jones acquired title to said tract by virtue of such deed, and the complainants appealed.

The proofs show that John Cline, the ancestor of all the parties to this suit, died intestate February 7, 1882, at an advanced age. He had, at various periods in his life, given to all of his children except Mrs. Jones (some eight or nine in number) money and property to a considerable amount. To none had he given less than \$1,000; to some as much as \$6,000 to \$8,000. To Mrs. Jones alone, up to the time of the alleged making of the deed in question, he had never given anything. On February 18, 1879, John Cline went alone before a justice of the peace, and had drawn up, and he signed and acknowledged, a warranty deed of this three-acre tract to Mrs. Jones, the deed reciting it was made in consideration of filial love and affection, and one dollar, and the property it conveyed being worth about \$700 or \$800. At the time, the grantor told the justice that he had given all of his other children land, but none to Mrs. Jones, and he felt he ought to give her this land. The grantor took the deed away, and ever after retained it in his possession till his death, it being found after that time among his papers. He also kept possession of the land, received the rents from it, and paid the taxes on it until his death. After he had thus signed and acknowledged the deed, he told different persons that he had made it—that he had made all his children equal—that the land would be Mrs. Jones' at his death; and to Mrs. Jones and her husband he said, several times, he had fixed it so that the land would be hers at his death, but that if she would move on it and live there it should then be hers. This

she never did. She expressed her gratification to her father for what he had done. The question which is made upon the deed is as to its delivery.

In *Bryan v. Wash* (2 Gilm. 557), it was said a delivery is essential to the validity of every deed, and that "anything which clearly manifests the intention of the grantor and the person to whom it is delivered, that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the party."

There is no doubt that the law makes stronger presumptions in favor of the delivery of deeds in case of voluntary settlements than in ordinary cases of bargain and sale, as has been frequently recognized by this court. (*Bryan v. Wash, supra*; *Reed v. Douthit*, 62 Ill. 348; *Walker v. Walker*, 42 Id. 311.) And we think the authorities establish that an instrument may be good as a voluntary settlement, though it be retained by the grantor in his possession until his death. (*Souverbye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, Id. 329; *Schrugham v. Wood*, 15 Wend. 545; *Perry on Trusts*, sec. 103, and our own cases above cited, and *Otis v. Beckwith*, 49 Ill. 121.) Yet the cases in this respect are generally attended with the qualification that there be no circumstances, besides the mere fact of retaining the instrument, to show that the executing party did not intend it to operate immediately, or to denote an intention contrary to that appearing upon the face of the deed. Thus, in *Souverbye v. Arden*, Chancellor Kent says: "A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted nor intended to part with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining it to show that it was not intended to be absolute." And in *Bunn v. Winthrop*: "The instrument is good as a voluntary settlement, though retained by the grantor in his possession until his death. There was no act of his, either at the time or sub-

sequent to the execution of the deed, which *denoted an intention contrary to that appearing upon the face of the deed.*" And in *Scrugham v. Wood* there is this quotation from *Garnors v. Knight* (5 Barn. & Cress. 671): "Where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, *and there is nothing to qualify that or to show that the executing party did not intend it to operate immediately*, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential." Mr. Lewin, in his work on Trusts, in treating of the formalities required to create a trust, on page 123 remarks: "A wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution." And on page 124, top, he quotes this observation of Buller, J., in *Habergham v. Vincent* (2 Ves. Jr.): "A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed by the execution; but a will is quite the reverse, and can only operate after death." The author then proceeds: "We may, therefore, safely assume, as an established rule, that if the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing in strict conformity with the statute enactments regulating devises and bequests."

In the case in hand there is that which denotes an intention contrary to that appearing upon the face of the deed, which shows that the deed was not intended to be absolute—that the grantor in it did not intend it to operate immediately—and that is, his declarations that the land was to be Mrs. Jones' at his death, but that if she would go and live upon it, it should be hers then, and the other circumstances corroborative of such intention. The deed by its purport was absolute, conveying the grantor's entire interest, to operate immediately.

But the evidence shows the deed was not intended to be absolute, but to be qualified in its effect—that it was not intended to convey the grantor's whole interest, but that he meant to have a life estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death, or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee. As, then, there was never any actual delivery of the deed, but the grantor ever kept it in his own possession, and as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instrument as the deed of the grantor, and it was not valid as a deed. As Mrs. Jones never moved on the land, this made the deed one to take effect at the grantor's death, which was a disposition of property of a testamentary character, and invalid, because not in compliance with the Statute of Wills.

In *Byars v. Spencer* (101 Ill. 429) it was held, that to constitute a sufficient delivery of a deed there must be a clear manifestation of the intention of the grantor that the deed shall at once become operative to pass the title, and that the grantor shall lose all control over it. That was a case of a father having executed a deed for land to his two minor children, and never actually delivering it, but retaining it in his possession until his death. There could be no doubt, from the evidence there, that it was in accordance with the intention of the father that if he should die without having made any other disposition of the land it should go to these two children. It is true there was there the evidence, additional to what appears in this case, of intention against the immediate operation of the deed, in the offer to sell the land. But the evidence shows that was not for the grantor's own benefit, but for the children's, in order to give them the proceeds. There was the same evidence of purpose to benefit the grantees there as here, and the same intention appearing that the deed should not have present operation, as here, only that it was stronger in degree in the last respect there than here. Yet because of

the intention shown that the deed should not operate presently as a deed, it was held, after the father's death, he not having sold the land, that there had been no delivery of the deed, and that it was invalid, and the land should go to the heirs in general.

An instructive case, as bearing upon the present by way of analogy, is that of *Basket v. Hassell* (107 U. S. 602), which involved the question of what constituted delivery of a gift *mortis causa*. There, one Chaney, being the holder of a certificate of deposit given by a bank in his favor, during his last sickness, and in apprehension of death, wrote on the back thereof the following indorsement :

"Pay to Martin Basket, of Henderson, Ky.—no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to myself.

"H. M. CHANEY."

Chaney then delivered the certificate to Basket, and died without recovering from that sickness. The certificate was payable on demand. It was held by the court that it was unquestionable that a delivery of the certificate to the donee with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*, but that the indorsement which accompanied the delivery qualified it, and limited the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death; that the property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor; that that qualification of the right which would have belonged to the donee if he had become the present owner of the fund, established that there was no delivery of possession according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition, and invalid, not being in compliance with the Statute of Wills.

In *Olney v. Howe* (89 Ill. 556) there was an instrument in writing, under seal, selling and transferring certain personal property to be given to, and taken by the transferee immediately upon the death of the one executing the instrument. It was there said: "The writing is essentially testamentary in its nature. . . . Its object was to make disposition of property after the death of the owner. It did not, after such death, take effect as a testamentary devise, for it was not executed and witnessed as required by the Statute of Wills."

There is a subordinate question in respect of one other of the defendants—Mrs. Sayles. The intestate, in his lifetime, had made to her a deed for forty acres of land, and she gave to him a receipt expressing that she had received from him the sum of \$1,000 in land. It is contended by appellants that this forty acres of land was an advancement to Mrs. Sayles, and should have been so treated, instead of decreeing, as the court did, that Mrs. Sayles had not been advanced, and that she should share equally with the others in the lands to be partitioned. The evidence shows the intestate had made various gifts of land and money to his children during his lifetime, and had endeavored to treat them equally in this respect. There was evidence of his repeated declarations that he had given all his children equal amounts of property, and that he had made them equal. The evidence on this branch of the case, which was objected to, we regard as properly received.

As to Mrs. Sayles, we think the decree correct, and it is affirmed as to her, and in all other respects except as to Mrs. Jones. As it regards her, the decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed in part and in part affirmed.

Scorr, J., dissenting. Dissenting, as I do, from the opinion of the majority of the court, I deem it proper to state my views at some length on the principal question involved.

As respects the property conveyed to Mrs. Sayles, I concur in the views of the court, as expressed in the prevailing opinion.

It is as to the property conveyed to Mrs. Jones I dissent from the conclusion reached by the majority of the court. In her answer she insists she is the sole owner of a tract of land described in the bill as consisting of three acres, by "virtue of a deed of conveyance thereof made to her by John Cline, . . . on, to wit, the 19th of February, 1879." The deed under which she claims the property seems to have remained in the possession of the grantor, with his other papers, until his death, which occurred on or about the 7th of February, 1882, and the insistence is, as the deed was never in fact delivered to the grantee, no title passed to her. It is satisfactorily proven by the scrivener who prepared the deed at the request of the grantor, and also by other witnesses, the deed to this land was made to Mrs. Jones as a gift, to place her on an equality with his other children, to whom he had given land or personal property, or both. After the execution of the deed he frequently stated he had now made his children equal in respect to the property bestowed upon them, and that the law would divide the remainder of his estate equally between his children. There can be no doubt that was his intention. All his other heirs got property from their father as gifts, and unless Mrs. Jones is permitted to retain the land embraced in this deed, she would receive a less portion of her father's estate than his other children. The just purpose of the grantor to make an equal division of his property among his children by conveying this land to Mrs. Jones, ought not to be defeated by any subtle reasoning.

The only question made is, whether the deed took effect notwithstanding it was never actually delivered to the grantee, or to any one for her. It was made upon a meritorious consideration, and was executed with the usual formalities prescribed by law. The grantor acknowledged before the proper officer, he "had signed, sealed and delivered said instrument as his free and voluntary act, for the uses and purposes therein set forth," and there is nothing in all the evidence in this record that shows, or even tends to show, that intention was ever revoked. On the contrary, he repeatedly affirmed it by declaring he had deeded the land to Mrs. Jones to make her

equal with his other children in respect to the property given to them.

Undoubtedly the general rule is, a deed takes effect from its delivery and acceptance, and most generally they are mutual and concurrent acts. It would be stating the rule broader than the law will warrant, to say no deed would take effect unless delivered into the actual possession of the grantee. The books abound in exceptional cases. Where the exception to the general rule is most frequently recognized, is in cases of voluntary settlements, as in the conveyance in this case. In such cases a common rule of the law of general application is, the "first deed and the last will" shall stand. A will is most generally retained by the testator, and so a deed making a voluntary settlement may be retained by the grantor and still take effect. On this subject Chancellor Kent, in *Southerby v. Arden* (1 Johns. Ch. 240), states the law to be in cases of voluntary settlements where the grantor retains the weight of authority, is decidedly in favor of its validity, unless there were other circumstances besides the mere fact of his retaining it, to show it was not intended to be absolute. In *Bunn v. Winthrop* (1 Johns. Ch. 336) the Chancellor said: "The instrument is good, as a voluntary settlement, though retained by the grantor until his death." Both of these cases were cited with approval in *Bryan v. Wash*, 2 Gilm. 557. In *Walker v. Walker* (42 Ill. 311) this court, in discussing the same subject, said: "No formal delivery to the grantee in person was necessary. If the grantor in a deed intends, when executing it, to be understood as delivering it, that is sufficient, the intention of the party is the controlling element, as said in *Masterson v. Cheek* (25 Ill. 76)." English and other American cases have been examined, and it is seen they are in harmony with the general doctrine here stated, and it will not be necessary to do more than to cite a few of the most important cases that are considered as supporting the rule: *Nulrod v. Gilham*, 1 P. Wms. 577; *Cotton v. King*, 2 Id. 358; *Clavering v. Clavering*, 2 Vern. 473; *Broughton v. Broughton*, 1 Atk. 625; *Johnson v. Smith*, 1 Ves. 314; *Wall v. Wall*, 30 Miss. 91; *Newton v. Bealer*, 41 Iowa, 334; *Mitchell v. Bryan*, 3 Ohio St.

377; *Otis v. Beckwith*, 49 Ill. 121; *Langham v. Wood*, 15 Wend. 545; *Jones v. Jones*, 6 Conn. 111; *Crawford v. Bertholf*, Saxton's (N. J.) Ch. Rep. 458; *Doe v. Knight*, 5 Barn. & Cress. 671. It would be useless to go over these cases again, since they have been fully considered by the courts in this country and in England, and with a uniform concurrence in the doctrine stated.

A principle running through many of the cases on this subject is, the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements than in ordinary cases of bargain and sale. It is for the reason the parties are supposed to place great confidence in each other. It was so expressly held in *Walker v. Walker*, *supra*. In the former class of cases (that is, cases of voluntary settlements), the intention of the grantor is most generally allowed to control, and the deed will be regarded as taking effect, or not, according to the intention of the grantor. It has been seen, in the present case, the intention the deed should take effect was never revoked by the grantor in his lifetime. His oft repeated wish was, it should take effect and pass the title to his daughter absolutely. The facts of this case bring it clearly within the rule deducible from the cases *ut supra*. It will also be observed, the case being considered has one feature not found in many of the cases on this subject, that makes it a stronger case for the application of the rule. Here the grantee was notified of the making of the deed by the grantor himself, and she accepted the grant by expressing her obligations for the bounty bestowed upon her, and would try to take care of it. Words of similar import, in *Kingsbury v. Burnside* (58 Ill. 310), were held to constitute an acceptance of the deed by the grantee, though the grantee died before taking it into actual possession. The reason for the decision in such cases is, assent is the principal element, and the taking of the deed into possession is not indispensable, but is only evidence of assent and acceptance. There being a clear intention manifested by the grantor in making the deed it should take effect at once, and that she should have the possession of the land on his death, or sooner if she would live on the premises, which intention was never

revoked, and there having been an acceptance of the deed by the grantee in the lifetime of the grantor, it would seem to follow, on principle as well as upon authority, the deed was effectual to pass the title to the grantee, although the grantor retained possession of the deed until his death. That he retained the deed for the benefit of the grantee sufficiently appears from the facts and the circumstances of the case. I am of opinion the decree should be affirmed.

WALKER, J. I fully concur in all that is said in this dissenting opinion.

GOUDIE vs. JOHNSTON.

[109 Indiana, 427.]

LIFE ESTATE WITH POWER OF DISPOSITION.

A bequest of personal property to a wife for use during her life, with power to control and manage the same, and at her death all remaining to go to grandchildren, vests in her a life interest, but with no absolute power of alienation. One having an estate in remainder in personal property may maintain a suit against the life-owner for the protection of his interest.

APPEAL from a judgment of the Franklin Circuit Court. The opinion states the case.

L. W. Florea, G. C. Florea, S. E. Urmston and I. Carter,
for appellants.

H. Berry, F. Berry, J. F. McKee, D. W. McKee, J. E. McDonald, J. M. Butler and A. L. Mason, for appellees.

ELLIOTT, C. J. In the will executed by Alexander W. Johnston, deceased, are the following provisions:

"Item 2. I give, grant and bequeath to my wife, Jane

Johnston, for her use during her natural lifetime, all the rest and residue of my estate, real and personal, not mentioned in item No. 1 of this will, she to have the control and management of the same, and at her death all of said personal estate remaining, and all of said real estate, except that named in item No. 1, shall go to and be equally divided among my grandchildren, to wit: Rose B. Goudie, Hannah A. Irwin, Clement A. Cory, Mand Cory and Lenora Cory, share and share alike; and if any of said grandchildren shall die without issue alive, before division or distribution of said property among them, then, and in that case, all of said property shall be equally divided among the survivors, unless one of them should be dead leaving issue, then such issue shall take the share that would go to such deceased grandchild if living.

"Item 3. I further will and direct that Clement R. Cory husband of Mary P. Cory, shall never have any part of my estate, or shall never have the management or control of the same."

There are other provisions in the will, but as these are all that relate to personal property, and as the controversy concerns only that property, it is unnecessary to notice the other provisions of the instrument. The provisions making a disposition of the personal estate of the testator are complete in themselves, and are neither aided nor impaired by any other provisions of the will, so that the decision of the controversy turns upon the construction to be given to the provisions of the will we have copied.

In our judgment, the controlling words of this will are, "for her use during her natural lifetime," for there are no other words of equal power in the instrument. These words not only confine the first taker's estate to her life, but they further confine it by declaring that the property is for her use. If the property is for her use during her natural lifetime, it is difficult, if not impossible, to conceive how she can have an absolute power of disposition. We freely grant that this power of disposition may often be implied. (*Silvers v. Canary*, 109 Ind. 267, and cases cited; *Ramsdell v. Ramsdell*, 21 Maine, 288; *Scott v. Perkins*, 28 Maine, 22; *Shaw v.*

Hussey, 41 Maine, 495; *Paine v. Barnes*, 100 Mass. 470; *Harris v. Knapp*, 21 Pick. 412; *Scholl's Appeal*, 2 Atl. R. 538.)

But we do not think that the language of the will before us contains words from which a power of disposition can be implied; on the contrary, we think the language excludes the implication that any such power exists. The words, "she to have the control and management of the same," are not at all incompatible with her right to use the property during her life. The only words which can be regarded as at all inconsistent with those confining her interest to an estate for life, are the words, "and at her death all of said personal estate remaining, and all of my real estate, except that named in item No. 1, shall go to my grandchildren;" but we cannot regard these words as of such potent effect as those first quoted. Nor would they be consistent with the language of the third item of the will, if construed as the appellees assume they should be, as is obvious from an examination of that clause.

It must be kept in mind that the property is not unconditionally devised to Mrs. Johnston even for life, for the bequest is "for her use during her natural lifetime." There is, therefore, a clear restriction, not only to her life, but to her use. It cannot justly be affirmed that one to whom property is bequeathed "for her use" during life is clothed with a power of disposition, for the word *use* is one of much force, and confines the estate to the hands of the first taker, since it is logically inconceivable that one having a right to use can possess the absolute power of alienation. We cannot thrust aside the words "for her use during her natural lifetime," for they are of high importance and great strength.

It is the law that an estate given in clear words cannot be cut down by subsequent words unless they are equally clear and decisive, and it is not easy to see why, upon a like principle, an estate created by clear words can be enlarged by words less clear and decisive. (*Hochstedler v. Hochstedler*, 108 Ind. 506; *Bailey v. Sanger*, 108 Ind. 264; *Allen v. Craft*, 109 Ind. 476.)

However this may be, here are words of clear and certain import, and no others that enlarge their meaning, and we must assign to them controlling force. But we have other provisions materially strengthening these words, for a remainder is limited to the testator's grandchildren, and it is, therefore, manifest that he contemplated that the estate should not all be disposed of by the first taker, for, if that had been in contemplation, there would have been neither necessity nor propriety in providing for a disposition of property remaining after the death of the first taker. The rule recognized by the authorities is, that where there is a remainder limited to children or grandchildren, the implication is that the first taker is invested with nothing more than a life interest in the property. (Hawkins Wills [2d ed.], 178.) This, it is easy to see, is the natural and reasonable rule, for, if the first taker took the whole estate, there could be no estate or interest in remainder.

Personal property is, as every one knows, of a perishable nature, and use may totally destroy or materially impair it, so that it is quite natural and reasonable to interpret the phrase, "all of said personal estate remaining," to mean such as use has not destroyed. This is a just and reasonable implication, especially so where, as here, it is consistent with the other provisions of the will. We are not, however, without authority upon this precise question. The Supreme Court of the United States, speaking of a will very like the one before us, said: "The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to his children a remainder in the real estate, and whatever of the personalty as was not consumed by the widow during her widowhood." (*Giles v. Little*, 104 U. S. 291.) In *Green v. Hewitt* (97 Ill. 113; 13 Am. R. 102) it was said: "It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence, in making the limitation over, it was but natural and proper to use the expression 'whatever remains.' It had reference to the anticipated

condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has."

It is quite clear that the words "all of said personal property remaining" are of feeble effect as compared with the words "for her use during her natural lifetime."

Our ultimate conclusion upon this branch of the case is, that Jane Johnston takes a life interest in all the personal property of which her husband died seized, but that she is not invested with an absolute power of alienation. This conclusion, as we think we have shown, rests on principle, and it certainly is well sustained by authority.

The case of *John v. Bradbury* (97 Ind. 263) carries the general doctrine much further than we are required to do here—possibly too far—and the case of *Van Gorder v. Smith* (99 Ind. 404), while recognizing the general doctrine, points out the true distinction between seemingly similar cases. There are other cases in our reports which assert a doctrine strictly analogous to that affirmed in our conclusion, among them *Hopkins v. Quinn*, 93 Ind. 223; *White v. Allen*, 81 Ind. 224; *Eltzroth v. Binford*, 71 Ind. 455.

The decisions of other courts affirm the law to be as we have asserted it. (*Smith v. Bell*, 6 Peters, 68; *Giles v. Little*, *supra*; *Brant v. Virginia Coal, &c., Co.*, 93 U. S. 326; *Green v. Hewitt*, *supra*; *Henderson v. Blackburn*, 104 Ill. 227 (44 Am. R. 780); *Whitcomb v. Taylor*, 122 Mass. 243; *Paine v. Barnes*, 100 Mass. 470; *Baxter v. Bowyer*, 19 Ohio St. 490; *Stuart v. Walker*, 72 Maine, 145 (39 Am. R. 311); *Terry v. Wiggins*, 47 N. Y. 512; *Gregory v. Cowgill*, 19 Mo. 415; *Hull v. Culver*, 34 Conn. 403.)

Some of these cases go further than it is necessary for us to do here, but, in so far as they bear upon the phase of the question directly presented to us, we accept them as authority without inquiring whether it is, or is not, proper to extend the doctrine to the limits to which some of the courts have carried it.

The theory of the appellants' complaint, and the concessions of their argument in this court, are, that Jane Johnston has a

right to use the property for her support, and for that purpose to dispose of it, but that she has not the absolute power of alienation. Thus regarded, the case is far within the rule, and the construction given the will by the trial court was not the proper one.

If Mrs. Johnston has only an executory life interest in the personal property involved in this controversy, then, upon sound principles of equity and justice, those who have an interest in remainder have a right to invoke the aid of the courts to protect that interest. It is, perhaps, not easy to determine just what interest they are entitled to, but it is clear that they are not entirely without a remedy. Mrs. Johnston cannot be inhibited from managing and controlling the property, for that right is expressly given her by the will; but she may be prohibited from destroying it, and from disposing of it, unless it is necessary that it be disposed of for her use and support, or for the purpose of making a change in the investments. The complaint, as we understand it, concedes to her the right to the management and control of the property, as well as the right to make sales for the purpose of changing an investment, or for the purpose of securing money for her support; but it denies her right to exercise absolute ownership over the property. Our judgment is, that the complaint does not claim too much; whether it claims as much as the law would award the plaintiffs, it is not necessary for us to consider or decide.

It is a very old equity doctrine, that courts will award relief to one holding an interest in remainder against the wrongs of an owner of a life interest. Anciently, the rule seems to have been that the owner of the life estate would not be required to give security, but would be required to file an inventory of the property. (*Foley v. Burnell*, 1 Bro. Ch. Cases, 274; *Slanning v. Style*, 3 Peare Williams, 334.)

Chancellor Kent says: "Lord Thurlow said that the party entitled in remainder could call for the exhibition of an inventory of the property, and which must be signed by the legatee for life, and deposited in court, and that is all he is ordinarily entitled to. But it is admitted that security may still be re-

quired in a case of real danger that the property may be wasted, secreted, or removed." (2 Kent Com. [12th ed.] 354, and authorities cited in note.)

It has also been held by able courts, that the owner of the life interest may be compelled to make a permanent and secure investment for the protection of those whose interest is in remainder. (*Covenhoven v. Shuler*, 2 Paige Ch. 122; *De Peyster v. Clendining*, 6 Paige Ch. 295.)

The question as to the character and scope of the remedy is not very fully discussed, and we decline to decide what it should be, nor is it essential that the question should be now determined, as it is enough for us to declare, as we do, that the complaint contains facts showing that the plaintiffs are entitled to some relief, for, as is well settled, a complaint containing facts entitling a plaintiff to some relief will repel a demurrer. (*Bayless v. Glenn*, 72 Ind. 5.) The measure of relief to which a plaintiff is entitled cannot, ordinarily, be determined on a demurrer to the complaint, since, if the complaint makes a case for some relief, although not all that is asked, a demurrer should be overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

NASH vs. SIMPSON.

[78 Maine, 142.]

DEVISE TO A WIDOW WHILE SHE REMAINS UNMARRIED.

A testator devised to his wife as follows: "All my real estate, together with any and all right, title, and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire, to remain hers so long as she shall remain unmarried after my decease. But if she shall marry again, then from that time she shall be entitled to, and receive only one-third part of all that remains. It is my desire and will that said real estate shall remain as it is for twenty years, giving all the income thereof to my said wife, but authorizing her, in case of necessity, to sell any part thereof for her sup-

port and maintenance during her widowhood"—with no devise over. The widow died without having married again. *Held*: 1. That the widow, by clear and apt words of the will, took a life estate only. 2. That the contingent authority to sell for her support during the widowhood, did not enlarge her estate to a fee, conferring only a power and not property.

BILL IN EQUITY to obtain a construction of the will of Simeon H. Nash, and for an account and partition.

Davis & Bailey, for plaintiff.

F. H. Appleton (*A. L. Simpson* with him), for defendant.

VIRGIN, J. Simeon H. Nash died testate, leaving a widow and two heirs—one a daughter, and the other a daughter of a deceased daughter—the defendant.

The complainant claims that by the will of the testator his widow took only a life estate in the real estate, and that as the reversion was not disposed of by the testator, the two heirs became tenants in common, each owning an undivided half thereof.

The defendant contends that the widow took a fee; and that as the widow died intestate, the reversion descended to herself as the only surviving heir.

The first question therefore is, what estate did the widow take under the fourth item of the will.

It is common knowledge that the language adopted by the testator—"all my real estate, together with any and all right, title, and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire"—would be ample in a devise, without any words of inheritance or limitation, even before any statutory provision relating thereto to carry the fee. And the statute goes still further by providing that a devise of land conveys all the estate of the devisor therein, unless it appears that he intended to convey a less estate. (R. S. c. 74, § 16.) The omission from the several subsequent revisions of the word "clearly" next before "appears" in the revision of 1841, c. 92, § 26, does not change the meaning. The inevitable conclusion must therefore be that the widow took a fee, unless it clearly appears by the will that a less

estate was intended. And we are of opinion that the words—"to remain hers so long as she shall be or remain unmarried after my decease"—are words of limitation which clearly show it to have been the intention of the testator to limit the duration, at longest, to the natural life of his widow. They can mean no more than "during widowhood" (*Loring v. Loring*, 100 Mass. 341), and the term must be considered to be measured by the life of a person in *esse*. (1 Wash. R. P. 63.) Such and similar phrases have ever since the time of Lord Coke been so construed. (*Mansfield v. Mansfield*, 75 Maine, 512, and cases there cited; 1 Wash. R. P. 103; Bac. Ab. 454; *Dole v. Johnson*, 3 Allen, 364.)

The last case cited, so far as this question is concerned, is very much like the one at bar. The language of the devise to the widow in that was: "All my real and personal estate, together with any and all estate, right, or interest which I may acquire after the date of this will, as long as she shall remain unmarried and my widow." And in that case as in this there was no devise over.

And on the question of intestacy—which consideration has been urged here—the court, after remarking that the preventing of intestacy is an object generally to be sought in the construction of wills, say: "The will does not anywhere profess to dispose of the whole estate; and as to the remainder of his real estate, after the estate for life or widowhood devised to his wife, no disposition is made of it. It is certain, therefore, that to some extent it was his intention to die intestate." We may well adopt this language, although general introductory words, such as "touching all my temporal estate" and the like, may have some effect in the construction of subsequent devices, are not of themselves sufficient to extend a devise for life to a fee. (3 Greenl. Cr. 176, and note.)

As the widow therefore, by force of the clear, apt, and explicit words of the will, and not by implication, took a life-estate only, the contingent authority, "in case of necessity to sell any part of the estate for her support and maintenance during her widowhood" does not enlarge her estate to an absolute fee. (*Warren v. Webb*, 68 Maine, 187; *Stuart v.*

Walker, 72 Maine, 146.) Such authority confers only a power and not property. (*Ayer v. Ayer*, 128 Mass. 575; *Burleigh v. Clough*, 52 N. H. 267; *Herring v. Barrow*, 13 Ch. D. 144; *Rhode I. H. Tr. Co. v. Com. N. Bank*, 1 E. Rep. 44.) This construction gives full legal force to the language and intention of the testator.

It is urged that the clause—"but if she shall marry again, then, from that time, she shall be entitled to receive only one-third part of all that remains," gives her, in case of marriage, one-third in fee—which would result in giving her a larger estate in quality if she acted against the wishes of her husband than she would receive if she acted in accordance therewith, by remaining unmarried. But we do not so understand it. This clause of itself gives her nothing. It only reduces the quantity of property in case the contingency happens which was given to her by the former clause, which alone contains words of devise. In other words, if she married, she was then only to have one-third of the estate devised for life less what she might dispose of under the power—just what would be equivalent to her dower.

The widow not having married again, we have no occasion to pass upon the question of the restraint of marriage; and if we had, we think the preponderance of authority allows a husband to consider the probabilities whether or not his children would be so well cared for if his widow formed a second alliance and became liable to be the mother of a second family, and govern the disposition of his property accordingly. (1 Jar. Wills [R. & T. ed.] 564, and note 29.) And it seems to be the opinion of the English Chancery Court that the same rule applies to widowers as to widows. (*Allen v. Jackson*, 1 Ch. D. 399.)

Nor can the clause—"It is my desire and will that said real estate shall remain as it is now for twenty years," &c., have any influence upon the life estate or upon the reversion—upon the life estate, for the testator could not restrain the alienation even of a life estate. (*Turner v. Hallowell Sav. Inst.*, 76 Maine, 527, 530.) Nor upon the reversion, for it

being undevise, its control is not governed by the will. (*Nickerson v. Bowlz*, 8 Met. 424, 430.)

Much stress has been laid upon the alleged real intention of the testator. But his intention, as deduced from the language of the will, is the criterion for its interpretation; and when thus ascertained, it is only to have effect provided it is consistent with the rules of law. (*Warren v. Webb*, 68 Maine, 135.) And the intention contended for, however plausible it may appear, cannot have effect because the rules of law will not permit. Moreover, we think it quite as certain that the testator really intended what the law declares he said: that his widow should not only have the personal property but a life estate in the real estate, with power to sell any of it for her comfort during her widowhood, and in case she married again, then what would be equivalent to dower, and the balance to descend to his and her children.

The allegation in the answer, unsupported by any evidence that the widow did exercise the power given her, is not relied upon in the argument.

Our opinion, therefore, is that by the will the widow took a life estate, with a contingent power to sell any part of it during her widowhood, which power she never exercised; that the reversion, being undisposed of by the testator, vested in his two heirs—daughter and granddaughter—subject to the contingency of the exercise of that power by the widow, or of a sale by his executor for the payment of debts which he did not leave or have been paid. (*Rich v. Rich*, 113 Mass. 197, 199.) And that the complainant being sole devisee of the daughter, holds under the will as tenant in common with the defendant, each share being one undivided half.

The plaintiff also seeks for partition of the premises.

Between tenants in common partition is a matter of right and not of discretion, whenever any one of them will not hold and use the property in common. (*Parker v. Gerard*, Amb. 236; *Agar v. Fairfax*, 17 Ves. 533; s. o., *White & T. L. Cas.* 516; *Hanson v. Willard*, 12 Maine, 142, 147; *Wood v. Little*, 35 Id. 107; *Allen v. Hall*, 50 Id. 253, 263.) And courts of equity, on account of their superior methods and procedure,

not only long ago assumed and exercised, concurrently with courts of law, jurisdiction of partition of land thus held (1 Sto. Eq. § 643 *et seq.*), but equitable jurisdiction was expressly conferred nearly thirty years ago. (R. S. [1857] c. 77, § 5, cl. 6; *Wilson v. E. & N. A. R. Co.*, 62 Maine, 112, 114.) Moreover, when one tenant has received more than his share of the rents and profits, an accounting may be directed and reimbursement decreed. (R. S. c. 77, § 5, cl. 6; *Leach v. Beattie*, 33 Vt. 195; 3 Pom. Eq. § 1389; 1 Sto. Eq. § 655.)

To entitle the plaintiff to a decree for partition, he must show that his legal title is clear. This expression, with very little variation, runs down through all the cases and text books. (*Cartwright v. Pultney*, 2 Atk. 380; *Parker v. Gerard*, Amb. 231; 1 Sto. Eq. § 653; 3 Pom. Eq. § 1388.) One court says: "In a suit in equity for partition, the legal title of the parties is never meddled with by the court. The individual rights of the parties to participate in the division, or to call for it, may come up, but not the simple question of conflicting title to the land. A plaintiff who comes into equity for partition must show a clear legal title." (*Stuart's Heirs v. Coalter*, 4 Rand. 74.) Some of the authorities say that where there are suspicious circumstances about the legal title, the decree will not be made. (*Cartwright v. Pultney*, *supra*.) The doctrine almost universally held is that if the plaintiff's legal title is involved in doubt, and is disputed and not established—as where it appears that the title depends upon forged deed (*Cartwright v. Pultney*, *supra*); or upon a settlement of a boundary (*Stuart's Heirs v. Coalter*, *supra*); or want of sufficient delivery of a deed (*Nichols v. Nichols*, 28 Vt. 228); and for various other causes (Freem. Cot. & Part. § 502), the court will retain the bill to give the plaintiff a reasonable opportunity to establish his title at law; when he has done that decree partition according to his established right. (*Cartwright v. Pultney*, *supra*; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 3 Johns. Ch. 302; *Ramsay v. Bell*, 3 Ired. Eq. 209; *Wisely v. Findlay*, 2 Rand. 361; *Howey v. Goings*, 13 Ill. 95; s. c., 54 Am. Dec. and note.)

So there are cases holding that when the title of the parties

depends upon the construction of a will, that question must first be settled at law. (*Stawle v. Barlow*, L. R. 7 Ch. 296 ; *Manners v. Manners*, 1 Green's Ch. 384.) But where the defendant, as in this case, is in possession, claiming to hold it under a will, and the complainant files his bill under the statute to have the will construed, for accounting and partition ; the court, in the absence of any defect in the latter's title, having acquired jurisdiction for the purpose of construing the will, has authority to do complete justice between the parties by compelling an account and partition. (*Scott v. Guernsey*, 60 Barb. 178 ; *Dameron v. Jameson*, 71 Mo. 105 ; *Hoey v. Goings*, *supra* ; Freem. Cot. & Part. § 449.)

But assuming the parties to have been tenants in common, with the right of possession on the decease of the widow, the defendant disputes the present title of the plaintiff on the ground that his conveyance to Bulfinch in February, 1875, was in fraud of the bankrupt law, and that the title by virtue of his bankrupt proceedings passed to his assignee, who, if any one, should have brought the bill.

On the other hand, the plaintiff contends that the conveyances through Bulfinch and J. H. Nash to himself—the latter more than a year prior to the filing of his bill—made his legal title clear ; and that as the defendant does not claim under the assignee, she cannot protrude that title.

We do not understand the rule to be that the defendant cannot raise that question as a defense here, unless she claims under the assignee, although two cases (*Portis v. Hill*, 14 Tex. 69, and *Burleson v. Burleson*, 28 Tex. 382, 413) seem to so hold. For all the other cases which an extended search has enabled us to find hold to the contrary ; and the reason assigned in some of them would seem decisive, viz. : that while at law partition is effected by the judgment of a court of law and delivery of possession in pursuance of it, equity consummates partition by directing and compelling mutual conveyances by the parties (*Cartwright v. Poultney*, *supra* ; *Whaley v. Dawson*, 2 Sch. & Lef. 366 ; *Gay v. Parpart*, 106 U. S. 679, 690) ; or by decreeing a pecuniary compensation to one of the parties for owelty (*Wilkin v. Wilkin*, *supra* ; 1 Sto. Eq. § 654) ;

or by ordering a sale of the premises and a division of the proceeds. (3 Pom. Eq. § 1390.) Therefore, to enforce a decree of partition between these parties in any of these modes, especially of the last two named, could not bind persons not parties; and if the assignee's title should subsequently prove good, the defendant would be in an undesirable plight. *Gay v. Parpart* (*supra*) is in harmony with this view, and contains nothing inconsistent herewith. Moreover, the defendant's title being unquestioned, she ought not to be drawn into any litigation concerning any controversy between the plaintiff and some third person as to the plaintiff's title. (*Whaley v. Dawson, supra*.)

We are therefore of opinion that before partition can be decreed, the plaintiff must establish, by some independent proper suit or action, his legal title.

But since we have settled what we suppose to be the principal contention—the construction of the will, and the parties may, perhaps, feel inclined to save further expense and delay by an amicable arrangement, we add by way of suggestion:

Assuming that the conveyance to Bulfinch, though made some seven months' prior to the commencement of the plaintiff's proceedings in bankruptcy, was in fraud of the bankrupt law, and that the land vested in the assignee by operation of law—how long does it remain there without being asserted by the assignee? An assignee, unlike an executor of a deceased testator, is not bound to take possession of all property that thus vests in him. It may be onerous property depending upon uncertain litigation. He may elect to take it or not to take it; and if he elects not to take it, then it survives to the bankrupt unless he has disposed of it. Moreover, he must elect within a reasonable time; otherwise it is deemed an election to reject it. (*Amory v. Lawrence*, 3 Cliff. 523, 535–6, and cases there cited.)

Again, by U. S. R. S. § 5057: "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or right of property transferable to or vested in such assignee, unless brought within two years from

the time when the cause of action accrued for or against such assignee." Now the legal title passed to Bulfinch in February, 1875, and thence to J. H. Nash in July, 1875, and both deeds were duly recorded, showing the nominal consideration. Did not the failure of the assignees to move within two years make valid the title of J. H. Nash? (*Meeks v. Olpherts*, 100 U. S. 564; *Trimble v. Woodhead*, 102 U. S. 647, 649.)

If not arranged the bill will be retained, so far as partition is concerned, to afford the plaintiff an opportunity, under R. S. c. 104, §§ 47 and 48, or some other mode which may be proper, to establish his legal title, when further proceedings will be had according to his established rights.

Bill sustained so far as construction of the will is concerned; but bill retained to allow complainant to establish his legal title, when further proceeding will be had according to his established rights. Question of costs reserved till final decree.

PETERS, C. J., DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred.

ALLEN vs. CRAFT.

[109 Indiana, 476.]

TRUST.—ESTATE TAIL.—THE RULE IN SHELLEY'S CASE.

A devise to a trustee, with no power of control or disposition, is ineffective, and the estate vests directly in the beneficiary. That which would have been an estate tail at common law is an absolute estate in fee, under the statutes of this State.

The word "heirs" has a fixed, legal meaning, and can only be held to mean children, or to be a word of purchase, when it is clear that such was the intention of the testator. When the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Superadded words which merely describe or specify the incidents of the estate created by

such a word of limitation as the word "heirs," do not cut down the interest of the devisee. The word "issue" is ordinarily a word of limitation of the same force as the word "heirs."

APPEAL from a judgment of the Laporte Circuit Court.

W. B. Biddle and *C. H. Truesdell*, for appellants.

M. H. Weir, *E. E. Weir*, *J. Bradley*, *J. H. Bradley*,
D. J. Wils and *F. E. Osborn*, for appellees.

ELLIOTT, C. J. The second item of the will of Catharine Allen reads thus :

"*Secondly*. I devise and bequeath unto John Allen, of Xenia, in Greene county, in the State of Ohio, in trust for Mrs. Matilda Allen, the present wife of my son, Mark Allen, and her heirs forever, the following real estate, to wit: The south half of section 28, in township 36 north, of range 3 west, situate and lying and being in the county of Laporte, aforesaid. And I hereby direct that the said Matilda shall have the sole use, control, benefit and profits thereof, free and clear of and from her said husband, my son, Mark Allen, and free and clear of all interference on his part in the management thereof, the receipt of profits arising therefrom, and in all matters whatsoever during her natural life, and at and after her death, then the heirs of her body shall in all things control and manage the same and receive the rents and profits arising therefrom: *Provided*, nevertheless, that upon the death of my son, Mark, if my said daughter, Matilda, should survive him, the heirs of her body then living and in being shall thenceforward be entitled to receive two-thirds of the profits thereof, to be equally divided between them, and should the said Matilda marry again, then the heirs of her body then in being shall thenceforward manage and control the said land, still giving to my said daughter one-third of the profits during her natural life, but in no case shall the issue of my daughter, Matilda, by any marriage other than with my son, Mark, be entitled to inherit anything under or by virtue of this will, but I expressly prohibit them therefrom,

and in case that my daughter, Matilda, shall survive her present husband, she shall not, after his death, alienate the said estate."

The designation of John Allen as trustee is ineffective, inasmuch as no power of control or disposition is vested in him. The estate, whatever its character, devised to Matilda Allen vests directly in her. This is the effect of the statute, as the trust is a mere naked one. (R. S. 1843, p. 447, § 181; R. S. 1881, § 2981.)

The controlling question in the case is as to the nature of the estate devised to Matilda Allen. If the estate devised is a fee, then the judgment below was right; if not, the judgment is wrong and must be reversed.

The contention of appellees' counsel, that if the estate devised would have been an estate tail at common law, it is an estate in fee simple under our statute, must prevail. (R. S. 1843, 424, § 56; R. S. 1881, § 2958; *Tipton v. La Rose*, 27 Ind. 484.)

There were at common law two kinds of estates tail, general and special. Blackstone thus describes the latter: "Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general." (2 Blackstone Com. 113.)

In this instance, if the estate devised is an estate tail, it is a special one, for the words of the will restrain the persons who shall take to those begotten by the son of the testatrix and the husband of the donee. The inquiry as to whether the estate tail, conceding that this is the estate created by the devise, is a special or a general one, is important only for the purpose of showing that a limitation to a designated class of heirs does not cut down the estate of the first taker to less than a fee, for the estate is a fee although the limitation may be to a designated class of heirs to the exclusion of all others. It results from this rule of law, that the limitation to the heirs of the body of Matilda Allen, begotten by Mark Allen, does not, in itself, further affect the devise than to make it what at common law would be an estate tail special, but if it be such an estate at common law, then, by force of our statute, it is an

absolute estate in fee, since all estates tail are transformed into fees absolute.

What we have said disposes of the clause limiting the inheritance to the heirs begotten by Mark Allen, considered in itself and apart from the other provisions of the will, and we proceed to analyze and discuss the other provisions of the instrument.

It is firmly established by our decisions, that the rule in Shelley's case is the law of this State. In one case the court declared and enforced this rule, but expressed the hope that it might be changed by legislation, avowing that it was not within the power of the court to change it, much as the court doubted its wisdom and justice. (*Siceloff v. Redman*, 26 Ind. 251, see p. 259.) But the rule has been so repeatedly and emphatically declared to be a rule of property, that it is no longer a question as to its binding force upon the courts of the State. (*Hochstedler v. Hochstedler*, 108 Ind. 506; *Fountain County, &c., Co. v. Beckleheimer*, 102 Ind. 76 (52 Am. R. 645), and auth. cited, p. 77; *Shimer v. Mann*, 99 Ind. 190 [50 Am. R. 82]; *Ridgeway v. Lanphear*, 99 Ind. 251; *Biggs v. McCarty*, 86 Ind. 352 [44 Am. R. 320]; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283.)

The clause in the will containing the words "unto Matilda Allen and her heirs forever," if it stood alone, would unquestionably carry the case far within the rule in Shelley's case. (*Shimer v. Mann*, *supra*, and cases cited; *Hochstedler v. Hochstedler*, *supra*.) The clause cannot, however, be severed from those with which it is associated, but must be considered in conjunction with them.

We have no doubt that a clause creating an estate in fee may be so modified by other clauses as to cut down the estate to one for life, but to have this effect the modifying clauses must be as clear and decisive as that which creates the estate. (*Hochstedler v. Hochstedler*, *supra*; *Bailey v. Sanger*, 108 Ind. 264; *Thornhill v. Hall*, 2 Clarke & F. 22; *Collins v. Collins*, 40 Ohio St. 353; *Lambe v. Eames*, L. R. 10 Eq. Cases, 267;

Clarke v. Leupp, 88 N. Y. 228; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.)

If the other words of the will are as strong and clear as those of the clause "unto Matilda Allen and her heirs forever," then it may well be held that the estate is less than a fee. The word "heirs" is, as Mr. Preston says, the "most powerful" that can be employed, and this our cases recognize. (*Shimer v. Mann, supra*, and cases cited; *Hochstedler v. Hochstedler, supra*.)

Strong as is the word "heirs" it may be read to mean children, if the context decisively shows that it was employed in that sense by the testator. (*Ridgeway v. Lanphear, supra*; *Shimer v. Mann, supra*; *Hadlock v. Gray*, 104 Ind. 596.) But there must be no doubt as to the intention of the testator to affix to the word "heirs" a meaning different from that assigned it by law. (*Shimer v. Mann, supra*; *Jessen v. Wright*, 2 Bligh [H. L. Cases], 1, 56; *Doe v. Gallini*, 5 B. & Ad. 621; *Lees v. Mosby*, 1 Y. & Coll. Exch. Cases, 589; *Powell v. Board, &c.*, 49 Pa. St. 46, 53; *Den v. Emans*, Penn. [N. J.] 967; *Robins v. Quinliven*, 79 Pa. St. 333.)

It appears from these principles, that the words employed in the clause "unto Matilda Allen and her heirs" must prevail to carry a fee, unless we find equally clear and decisive terms cutting down the estate, and this is not possible unless, as said in one of the cases cited, the intent to employ the word "heirs" in a different meaning from that assigned it by law is so plain that nobody can misunderstand it. Our search then must be made with these rules as our guide.

The clause which gives to Matilda Allen the sole control of the estate during life, and after her death "then to the heirs of her body," is but a reiteration of the meaning conveyed by the clause we have already discussed, for in themselves they carry a fee, as the powerful term "heirs" is still employed. Proceeding with our analysis, we come to the clause, "Provided, nevertheless, that upon the death of my son, Mark, if my daughter should survive him, the heirs of her body then living shall thenceforth be entitled to receive two-thirds of the profits thereof, to be equally divided among them, but should

the said Matilda marry again then the heirs of her body then in being shall thenceforward manage and control the land, still giving to my daughter one-third of the profits thereof during her natural life, but in no case shall the issue of my daughter by any marriage other than with my son, Mark, inherit anything under or by virtue of this will, but I expressly prohibit them therefrom, and in case that my daughter, Matilda, should survive her present husband, she shall not after his death alienate the said estate.

The introductory clause in which the word "heirs" occurs undoubtedly shows, if taken by itself, that the word was not used as signifying heirs in the legal sense of the word, but we cannot separate this clause from the other members of the sentence, and considered, as undeniably it must be, in connection with them, it must yield. This we say because in the clause blended with it is the word "issue," and this is ordinarily a word of limitation of the same force as the word "heirs."

In *Quackenbos v. Kingsland* (102 N. Y. 128; 55 Am. R. 711) the words of the will were: "I give, devise, and bequeath unto my son, Daniel Kingsland, and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children," and it was held that Daniel took an estate in fee. The definition of the word "issue" was tersely stated by Lord Eldon, in *Sibley v. Perry* (7 Vesey, 522), for he said: "Upon all the cases this word *prima facie* will take in descendants beyond immediate issue."

In *Powell v. Board, &c.* (49 Pa. St. 46), it was said: "Undoubtedly in a will the word 'issue' is regarded as primarily a word of limitation, and as synonymous with the technical words 'heirs of the body.' Hence it is presumed that when a testator devises an estate for life, with a remainder to the issue of the devisee of that estate, he intends the remaindermen to take as heirs of the body by descent from their ancestor, rather than as purchasers, themselves the root of a new succession."

To a like effect is the statement in *Den v. Emans* (Penn.

[N. J.] 967, 971), that "The word *issue*, in a devise, as a word of limitation, is synonymous to heir; it is *nomen collectivum*, and takes in the whole generation."

In *Robins v. Quinliven* (79 Pa. St. 333) these words were used: "The word 'issue' in a will *prima facie* means 'heirs of the body,' and in the absence of explanatory words showing that it was used in a restricted sense, is to be construed as a word of limitation."

In *Carroll v. Burns* (15 Weekly Notes of Cas. 553; 55 Am. R. 778, n.) it is said: "The rule is unquestioned that *prima facie* in a will, the word issue means 'heirs of the body,' and will be construed as a word of limitation, unless there be explanatory words showing it was used in a restricted sense."

These decisions, to which many more might be added, do no more than give expression to a long-existing and well known principle, and the rule, affixing to the term "issue" the meaning expressed in these cases, requires that the term, as used in the will before us, should be deemed to mean "heirs," in the sense in which that term is employed in the clause of the will which reads "unto Matilda Allen and her heirs forever." (Hawkins Wills, 189.)

It is contended, however, that the restriction upon the power of alienation evinces an intention to devise only a life-estate to Matilda Allen. But it is to be noted, that the language in which the restriction is expressed is ambiguous, if, indeed, the only just meaning that can be put upon it is not adverse to the appellant's contention. The restriction is, not that Matilda shall in no event alienate the land, but that she shall not do so in one event, that is, in the event that she survives her husband. The clear implication is, that during her husband's life she was empowered to alienate the land, so that, so far as the question of alienation is concerned, the words of this part of the will are not inconsistent with those which so clearly and decisively create an estate in fee. If only a life-estate was intended to be vested in the first taker, then there was no reason for imposing a restraint upon the power of alienation. But, under the rule of which we have

spoken, we cannot enter into conjectures as to the effect of the clause respecting the power of alienation, for, unless it can be affirmed that the clause is as clear and decisive as that which creates the estate, the estate cannot be cut down. It would have been impossible to have found in all the domain of legal terminology stronger words than those employed "to Matilda Allen and her heirs forever," and they must control the feeble influence of the clause which attempts to limit the right of Mrs. Allen to alienate the land devised to her.

There is another principle in the law of real property which exerts a controlling influence here, and that is this: Where an estate in fee is created in clear and decisive terms, a restriction upon the right of alienation is of no effect. There may be a partial restriction, but there cannot be a general one. This must be so, or else reason and logic must be disregarded, for a fee simple necessarily implies absolute dominion over the land, and this cannot exist if the power of disposition is hampered by a restriction destroying the absolute dominion inherent in the owner of the fee. (*McWilliams v. Nisly*, 2 S. & R. 507; *Moore v. Shultz*, 18 Pa. St. 98; *De Peyster v. Michael*, 6 N. Y. 467; *Mandlebaum v. McDonell*, 29 Mich. 78; 4 Kent Com. 5.)

Undoubtedly, the cardinal rule in the construction of wills is, that the intention of the testator shall prevail; but where words are used which have a settled legal meaning, full effect must be given to them.

The cases go very far upon this question. Thus, in *Doe v. Jackman* (5 Ind. 283) it was said: "But the term 'heirs' is one of limitation. It has a fixed and legal meaning, and a mere presumed intention will not control its signification. It cannot be held a word of purchase unless the testator's intent so to use it appears manifest."

In *McCray v. Lipp* (*supra*) the court said: "Under the rule in Shelley's case, the fee passes in opposition to the apparent intention of the testator."

This court, in *Siceloff v. Redman* (*supra*), said: "Although from this language it is apparent that the testator intended that Virginia should take a life estate only, and that her heirs

should take after her death, and as the estate so intended to be granted to Virginia would terminate at her death, and could not, therefore, descend to her heirs, it would seem apparent that the testator intended that the heirs should take directly from him, as purchasers, and not by descent from the ancestor; yet, by the technical meaning applied to the word heirs, under the rule in Shelley's case, this apparent intention is denominated a presumed intent, and is not allowed to control the technical meaning of the word heirs, or in other words, despite the apparent intent of the testator, the rule gives the fee to the ancestor."

Again, in the case of *Gonzales v. Barton* (45 Ind. 295), the court said: "If the question could be regarded as one of intention, there would be no difficulty in coming to the conclusion that in this case it was intended that Morey should take a life estate only. But such is not the rule, as may be seen by reference to the cases cited as having been decided in this court."

Mr. Fearne states the rule very strongly, perhaps too strongly, for he says that the most positive directions will not defeat the operation of the rule in Shelley's case. (2 Fearne Remainders, § 453.)

Judge Sharswood, in delivering the opinion of the Supreme Court, in *Ingersoll's Appeal* (86 Pa. St. 240, 245), said: "Nothing, certainly, is better settled than that the intention of a testator, if not contrary to law, shall be carried out in the disposition he may make of his property after death. There are many things which he cannot do, however clearly he may intend it. He cannot create a fee and clog the power of alienation or relieve it from liability for debts. He cannot create a perpetuity by an executory devise after an indefinite failure of issue or at any other future period, which may not be until after a life or lives in being and twenty-one years." The same learned judge, in *Doebler's Appeal* (64 Pa. St. 9), at page 15, said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have

gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him instead of construing that which he has made."

In *Bender v. Fleurie* (2 Grant Pa. 345) the testator gave to his daughter certain lands in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use." This was held to be clearly an estate tail within the rule, and it was said by the court: "But it is said, the testator did not mean to give her an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give but a life estate *voluit [sed] non dixit*, we must take what he said, not what he meant. . . . But no court in this State or in England has ever treated the phrase, 'heirs of her body,' as words of purchase, when they are used with reference to the issue of a devisee, to whom a life estate is given. They are words of limitation, and as such they create an estate tail in the first taker, which cannot be cut down even by the clearest expressions of a desire that it shall be a life estate only."

Preston says: "In wills, the rule applies generally, and without exception, to the several limitations, as often as the gift to the heirs is without any expression of qualification," and in illustration of his meaning, he further says: "Neither the express declaration—*First*. That the ancestor shall have an estate for his life and no longer; nor, *Secondly*. That he shall have only an estate for life in the premises, and that, after his decease, it shall go to his heirs of his body, and, in default of such heirs, vest in the person next in remainder; and that the ancestor shall have no power to defeat the intention of the testator; nor, *Thirdly*. That the ancestor shall be tenant for his life and no longer, and that it shall not be in his power to sell, dispose or make away with any part of the premises;

. . . will change the word heirs into words of purchase." (Preston Estates, 365.)

In a work declared by the Supreme Court of Pennsylvania, in *Hileman v. Bouslaugh* (13 Pa. St. 344), to be a "masterly disquisition," it is written: "The requisite limitation to the ancestors and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not—whether the author of the limitations intended it to be applied or not. We might as well ask whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exceptions." (Hays Principles for Expounding Dispositions of Real Estate, 96 [7 Law Library, 52].)

The question here under discussion was examined by us in *Shimer v. Mann* (*supra*), and many authorities considered. As a result of that investigation it was declared that "Super-added words, which merely describe or specify the incidents of the estate created by such a word of limitation as 'heirs,' do not cut down the interest of the devisee."

Stronger still is the expression of the rule in *Walker v. Vincent* (19 Pa. St. 369), for it was there said: "The law does not pretend to carry out the intention of the testator in all cases; for many testators show a very clear intention to shackle the estates granted by them to a degree that is totally incompatible with any real enjoyment of them, and which the law does not allow. . . . The great merit of the rule in Shelley's case is, that it frustrates and is intended to frustrate unreasonable restrictions upon titles; for when an estate is declared to be a fee simple or fee tail, it is at once made subject to a limitation in its proper form, no matter how clear may be the testator's intention to the contrary."

The words of limitation when used in a will always control. It is as certain as any proposition in jurisprudence, that the words of limitation will bear down all others. There is, therefore, no escape from the force of the rule in Shelley's case, when the word "heirs" is used in its strict legal sense as a word of limitation. But the word "heirs" is not in every

case a word of limitation, for it may be employed in a different sense. It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and the rule in Shelley's case; but this appearance of conflict fades away when it is brought clearly to mind that, when the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in Shelley's case; so that the inquiry is, was the word used as one of limitation? The only method in which an instrument employing the word "heirs" can be shown not to be within the rule, is by showing that the word was not employed in its strict legal sense. As said in *Hileman v. Bouslaugh* (*supra*), "The question on a will is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used the words 'heirs of the body' as synonymous with the word 'children,' or its proper equivalent." This is essentially the doctrine of our own case of *Shimer v. Mann*, *supra*. It is because the word "heirs" is not used in its legal sense, that the courts do not apply the rule in Shelley's case, for, where it is so used, the rule must be applied. It was because the word "heirs" was used as meaning "children," that it was held in *Ridgeway v. Lanphear* (*supra*), and in *Millett v. Ford* (109 Ind. 159), that the rule did not operate. Here, however, we must hold that it does operate, because the explanatory or superadded words do not show with that certainty which the law requires, that the word was not used as a word of limitation. (*Shimer v. Mann*, *supra*, and cases cited.)

Judgment affirmed.

Howe, J., does not concur in this opinion.

EMERY vs. BATCHELDER.

[78 Maine, 233.]

DEFICIENCY OF ASSETS.—RIGHTS OF ANNUITANTS AND GENERAL LEGATEES.

When the possibility of a failure of sufficient assets to meet the legacies named by a testator in his will has not been anticipated and specifically provided for by him, the presumption of intended equality prevails between general legatees, as well as equality in respect to the share to be borne in all deficiencies of assets. In the administration of testamentary assets where there is a deficiency of such assets after the payment of debts, expenses, and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general.

UPON an agreed statement of facts which sufficiently appear in the opinion.

Bourne & Son, for plaintiffs.

Strout & Holmes, for defendants.

FOSTER, J. Although the present action is for the recovery of a legacy given in the form of an annuity, the questions arising in the case depend upon the construction of the twenty-second clause in the will of Daniel Austin, late of Kittery, deceased. By that clause he provides as follows: "I direct my executors hereinafter named, to reserve from my estate, and to keep securely invested, such a sum of money as will be sufficient to produce a net annual income of four hundred dollars, and to pay the said income in equal quarterly payments of one hundred dollars each, to Mrs. Mary Emery, wife of F. C. P. Emery of Neponset, to her sole and separate receipt during her natural life; the first payment to be made three months from the date of my decease; the said principal sum at the death of the said Mary, to revert to and form a portion of my residuary estate."

The other provisions in the will become important only so far as they may serve to throw light upon the questions raised

in relation to the intention of the testator under the foregoing clause, and the nature and amount of the legacies given by the will.

From these provisions it appears that the whole amount of the legacies was forty-one thousand eight hundred dollars, exclusive of this annuity and residuary legacies. The defendants, as it appears, have settled two accounts, showing a balance at that time for distribution of forty-five thousand four hundred and twenty-six dollars and twelve cents. They also, in the execution of their trust, and supposing the estate to be sufficient to pay all the legacies and this annuity in full, paid to the annuitant six consecutive quarterly payments of one hundred dollars each, under the clause in question, beginning three months after the death of the testator, the last one being on the fourth day of June, 1879. It was then found that the estate as invested was insufficient to set aside enough to meet this annuity in full and pay all the legacies named in the will. Accordingly the defendants, estimating the proportion of all the general legacies which the estate would meet at eighty per cent., have, since the fourth day of June, 1879, paid the annuitant eighty dollars quarterly, subjecting the annuity and the legacies to the same proportional abatement.

The principal controversy, therefore, is whether this annuitant should suffer *pro rata* with the other general legatees in the will, or is entitled to priority over them and to payment of the annuity in full.

The answer to this proposition will be found when we come to examine the language used by the testator in the clause under consideration, the nature of the legacy therein named, and ascertain the intention of the testator as collected from the whole will; for his intention must be gathered, not from any particular clause alone, but from all the provisions of the will. And here we may say that the language used is such that there can be no question but that this legacy is general and not specific. It is for a certain amount to be paid from the general fund of the estate. It is not specific, because not of any particular thing or from any particular money of the testator's estate. Therefore the general rule is, that in the ad-

ministration of testamentary assets, when there is a deficiency of such assets after the payment of debts, expenses, and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. (*Towle v. Swasey*, 106 Mass. 104; *McLean v. Robertson*, 126 Mass. 538; *Swasey v. American Bible Society*, 57 Maine, 524.)

And it is the settled doctrine that annuities stand upon the same footing as legacies, and as between annuitants and legatees there is no priority, merely because one is an annuitant and the other a legatee, where the estate is deficient, but both must abate in the same proportion. (2 Wms. Exrs. *1367; *Croly v. Weld*, 3 De G., M. & G. 996; *Wroughton v. Colquhoun*, 1 De G. & Sm. 357.)

Of course the rule in reference to proportional abatement applies only in case the possibility of a failure of sufficient assets to meet the legacies named in the will has not been anticipated and provided for specifically by the testator. Whenever it can be shown that such possibility of deficiency of assets has been specifically provided for, then his directions will govern, and the loss must be borne by those upon whom he has seen fit to place it. Therefore, if by express words, or by a fair construction, the intent of the testator is clearly manifest that one general legatee should have priority over the others, that intention must be carried out. But the burden lies upon the party seeking priority to establish it, and show that such was the intention of the testator, for the reason that in the absence of proof of such priority the testator is presumed to have considered his estate sufficient to pay all legacies, and therefore not to have thought it necessary to provide for a deficiency by giving preference to any of those upon whom he has bestowed his bounty. (*Miller v. Huddleston*, 3 Macn. & Gord. 513.) Consequently no priority will be allowed where the expressions are ambiguous and do not mark with certainty the testator's intention. (*Swasey v. American Bible Society*, 57 Maine, 528; *Titus v. Titus*, 26 N. J. Eq. 111; *Thwaites v. Foreman*, 1 Collyer, 409.) The language used by the testator in the will is the basis of inquiry as to his intention; but such extrinsic circumstances as aid in

the interpretation of that language and assist in arriving at the intention may properly be considered.

In the light of these principles, when applied to the language used by the testator in the case before us, we fail to find anything, either in the particular clause or in any part of the will, or in the circumstances surrounding the case, which indicates any intention on the part of the testator that his annuity should have any preference over the other legacies. There is nothing to indicate that it was not his intention that all his legacies should be paid—certainly nothing which indicates that one should be paid at the expense of the others.

The fact so strenuously urged upon our attention by the learned counsel for the plaintiff, that the testator directed the first installment to be paid at the end of three months from his death, does not indicate sufficiently that intention which is necessary to give priority to this annuity. (*Swasey v. American Bible Society, supra*; *Everett v. Carr*, 59 Maine, 330.) Thus it has been held that it is not sufficient for such purpose that the testator gave a direction, as to a general legacy to his wife, that it should be paid *immediately* after his death out of the *first* moneys that should be received by the executors. (*Blower v. Morrett*, 2 Ves. Sen. 420.) And the same principle applies whether the annuity is to commence immediately on the death of the testator, or at some future period. (2 Wms. Exrs. *1367.) Nor will the meritorious character of the legatee, nor the fact of near relationship, be sufficient, when from the will itself there is no proof of an intention to prefer, although these facts, as stated by the Lord Chancellor in *Miller v. Huddleston (supra)*, may constitute “an auxiliary reason for allowing such priority where the words used will favor the notion of a priority to a sufficient degree.” And in this last case it was held that life annuities to a daughter and to other relatives were not entitled to priority over other legacies, the language of the will furnishing no proof of such intention.

There are cases, however, where a pecuniary legacy would undoubtedly be exempt from abatement, as where it is founded on a valuable consideration, such as the relinquishment of a

right of dower by the widow of the testator. (*Toule v. Swasey, supra.*) In such case the party takes not as a mere volunteer or beneficiary, but as a purchaser; for it is presumed that the testator intended to satisfy first the legal claims on his estate.

But in the case at bar it nowhere appears, and it cannot be claimed, that the annuitant, whose relationship is only that of niece to the testator, has any legal claim upon his estate other than as one of the general beneficiaries under his will. Had it been his intention that she should be preferred to the other legatees of the same class, it would have been very easy for him to have expressed such intention in unmistakable language. We must judge of his intention by what he has written rather than by what he might have written. There are a large number of general pecuniary legacies contained in the will, and, from anything that appears, any one of them is equally meritorious with that of the plaintiff.

Neither does the fact that the executors are directed to reserve from the estate, and keep securely invested, such a sum as will produce this annuity of four hundred dollars annually to the plaintiff, weigh sufficiently upon the question of intention to give preference or priority over the other general legacies. The executors owe the same duty and fidelity, in the administration of their trust, to the other general legatees as to this plaintiff. Most annuities of this kind have their origin from some specific directions on the part of the testator. Such directions may properly relate to the existence rather than the priority of the annuity.

It may be admitted as a well settled general principle, as claimed by the plaintiffs' counsel, that an executor is bound by directions in the will to invest money on interest, to pay the income as directed, and generally to conform to the directions given in the will. Yet, when there is found to be a deficiency of assets, and no specific provision is made for such a contingency, it will be seen that it becomes necessary to apply a somewhat different rule of law; for every clause and provision in a will should be carried into effect if it can be done consistently with the rules of law, and the intention of the testator. And the decisions to which our attention has

been called, where executors have been held strictly by the directions given in the will, are those where the estate has been amply sufficient to meet the different legacies mentioned. They cannot, therefore, be applied as the inflexible rule of action in cases where there is a deficiency of assets.

The evident intention of the testator here was, that his estate was amply sufficient to pay all the legacies. And when we examine the will and find that the possibility of a failure of sufficient assets to meet these legacies has not been specifically anticipated or provided for by the testator, we must be guided in our decision by the well settled rules of law—that the presumption of intended equality prevails between general legatees, as a class, as well as equality in respect to the share to be borne in all deficiencies of assets. Consequently the plaintiff must share the same proportional loss with the other objects of the same bounty.

The remaining questions submitted by the report, and which it becomes our duty to pass upon, may be briefly considered.

The act of the executors in the purchase of nine thousand and two hundred dollars in the United States four per cent. bonds for the purpose of being set aside under the twenty-second clause of the will, has been made the subject of severe criticism by the counsel for the plaintiff in his very able argument. But taking into account not only their security but also their exemption from taxation, and the comparatively small amount of trouble and expense in taking care of them, we do not feel justified in saying that the executors have acted in any way injudiciously in the investment which they have seen fit to make. The objection is not that the investment is not a safe one, but that, with the high rate of premium which these bonds command in the market as compared with the rate of interest which they pay, some other more profitable investment might have been made.

It appears from the account of the executors that these bonds were purchased at a premium of less than three per cent. True, they have appreciated in value; but investments carefully and judiciously made, are not, as a rule, to be dis-

turbed. As was said by the court in *Harvard College v. Amory* (9 Pick. 461): "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

The very recent case of *New England Trust Co. v. Eaton* (140 Mass. 532) reaffirms the doctrine of the foregoing case, holding that "the investment of trust property should be made with a view of permanency and not in a spirit of speculation."

Finally: It is the duty of the executors to ascertain the gross amount of all the general legacies to be paid under the will, after the payment of debts, expenses, and specific legacies; and if it be found that the estate as invested is insufficient to pay the general legacies, and to set aside enough to pay this annuity in full, then they should ascertain what proportion of the general legacies and of this annuity the estate to be divided will pay, subjecting the general legacies and the annuity (since June 4, 1879) to the same abatement *pro rata*.

Inasmuch as from the statement or figures before us it is impossible to ascertain the exact standing of the estate at the commencement of this action, and as a computation becomes necessary for the purpose of entering the actual judgment, upon the pleadings, in accordance with this opinion, the case is remanded for the amount of the judgment to be entered at *nisi prius* for whatever sum may be found due the plaintiff at the time this action was commenced, together with interest thereon to the time of judgment: If nothing is found due the plaintiff, then judgment should be entered for the defendant.

PETERS, C. J., WALTON, VIRGIN, and LIBBEY, JJ., concurred.

HASKELL, J., did not sit.

MILLETT vs. FORD.

[109 Indiana, 159.]

THE RULE IN SHELLEY'S CASE.

Where a will contained the following provision, "I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate," describing it, "to have the use of the above described land during said James' lifetime, and, after his death, to the heirs of his body bequeath [begotten] in lawful wedlock, and none others. I also give and bequeath to John C. Rachels, my son," certain described real estate, "said John to have the use of the same during his life, and, after his death, to his children bequeath [begotten] in lawful wedlock," the devisee took only a life estate in the land devised, the fee going to his children. Where the intention of the testator is plain, the rule in Shelley's case will not be allowed to defeat it.

APPEAL from a judgment of the Posey Circuit Court. The opinion states the case.

A. P. Hovey and *G. P. Menzies*, for appellants.

A. Iglehart, *J. E. Iglehart*, *E. Taylor*, and *E. D. Owen*, for appellee.

Howe, C. J. In this case the appellee sued the appellants to recover the possession of certain real estate in Posey county, and to quiet his title thereto. The cause was put at issue and tried by the court, and a finding was made for the appellee; and over the appellants' motion for a new trial, the court rendered judgment accordingly.

The only error complained of here by the appellants is the overruling of their motion for a new trial.

With his complaint herein, appellee filed an abstract of his title to the lands in controversy. By this abstract, to which, of course, his evidence was confined, his chain of title to such lands was substantially as follows:

1. John B. Rachels became possessed of such lands about the year 1825 or before, of which lands he and his assigns

held adverse, peaceable possession until his death, which occurred in the latter part of 1858, or early in 1859.

2. John B. Rachels, on the 25th day of July, 1857, or thereabouts, executed his last will and testament, which was duly admitted to probate in Posey county, whereby he devised such lands to James R. Rachels, who was a son of such testator, in fee simple.

3. James R. Rachels went into the possession of said lands under said will. He and his wife afterwards executed to Richard Ford a mortgage, with the usual covenants of warranty; and Richard Ford became the purchaser of the lands at the sale upon the foreclosure of such mortgage. At the expiration of the year allowed by law for the redemption of such lands, Richard Ford went into possession thereof by James R. Rachels, as his tenant, and afterwards assigned his sheriff's certificate of such purchase to William M. Ford, the plaintiff herein; whereupon the sheriff of Posey county executed to the plaintiff his deed therefor, according to law.

4. The defendants herein were the grandchildren of John B. Rachels, and the children of James R. Rachels, and had been in the possession of the lands in controversy since the death of James R. Rachels.

It will be observed that the devise of an estate in fee simple to James R. Rachels, in the lands in controversy, by the last will of John B. Rachels, is an indispensable link in appellee's chain of title. If, as appellants claim, James R. Rachels took no higher or greater estate in such lands than a life estate for his own life, under the last will of John B. Rachels, and if, as they claim, the lands were devised to them in fee simple, in and by such last will, subject only to the life estate therein of James R. Rachels for his own life, then it is clear that the appellee had no valid or subsisting title to the lands, and the finding of the trial court in his favor, as against the appellants, was not sustained by sufficient evidence and was contrary to law. This brings us to the consideration of what we regard as the controlling question in this cause, namely: What is the proper and legal construction and interpretation of the last will of

John B. Rachels, and, especially, of the devise therein to James R. Rachels?

We set out, in this connection, all the provisions of such last will that can have any possible bearing on the subject of such question, as follows:

"*First.* I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate in Posey county, Indiana, to wit" (we omit the description), "making in all one hundred and thirty acres, to have the use of the above described land during said James' lifetime, and, after his death, to the heirs of his body *bequeath* (sic) in lawful wedlock, and none others. I also give and bequeath to John C. Rachels, my son, the balance of my real estate during his lifetime, it being the forty acres tract in Gibson county; said John to have the use of the same during his life, and, after his death, to his children *bequeath* (sic) in lawful wedlock."

The foregoing are the only devises of real property in the last will of John B. Rachels. In each of these devises, it was the manifest intention of the testator to give his son named therein a life estate only, for his own life, in the lands devised to him, and, after his death, to give to his children, as the heirs of his body begotten in lawful wedlock, the fee simple estate in such lands. This is clearly so, as it seems to us, beyond any room even for a shadow of doubt. The accepted rule in the courts of this State, for testamentary construction and interpretation, is that the intention of the testator, in making the devise or bequest under consideration, must be ascertained and carried into effect, if possible; but this intention must, generally speaking, at least, be gathered from the language of the will itself. (*Tyner v. Reese*, 70 Ind. 432; *Lofton v. Moore*, 83 Ind. 112; *Hinds v. Hinds*, 85 Ind. 312; *Downie v. Buennagel*, 94 Ind. 228; *Pugh v. Pugh*, 105 Ind. 552.)

It is claimed, however, by appellee's learned counsel, that "the rule in Shelley's case" is applicable to the foregoing devise to James R. Rachels, and that, under this rule, James R. Rachels took an estate in fee simple, under the testator's will, in the lands devised to him. It is difficult to reconcile

"the rule in Shelley's case" with the accepted rule, sometimes called the "cardinal rule," heretofore stated, for testamentary construction and interpretation. But this court has held that, as the common law has been adopted by statute in this State, the rule in Shelley's case is binding upon the courts as a law of real property, and has applied such rule in the construction of devises. (*Siceloff v. Redman*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Gonzales v. Barton*, 45 Ind. 295.) While we might not agree to the application of the rule in Shelley's case to testamentary construction, if the question could be regarded as an open one, yet we would feel constrained, in a proper case, to adhere to our previous decisions.

In the well considered case of *McMahan v. Newcomer* (82 Ind. 565), in speaking of the application of the rule in Shelley's case to the construction of a devise of real property, the court says: "A fee will pass if, taking all the provisions of the will together, it is clear that the testator intended to vest such an estate in the devisee. (4 Kent Com. 535; *Smith v. Meiser*, 51 Ind. 419.) It is settled law that the rule in Shelley's case will not be allowed to defeat the plain intention of a testator. (*Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman*, 26 Ind. 251; *Helm v. Frisbie*, 59 Ind. 526; section 2567, R. S. 1881."

Applying the doctrine of the case last cited to the case under consideration, and taking together all the provisions of the last will of John B. Rachels, we are clearly of the opinion that the testator did not intend to vest the fee simple estate in the lands devised to either of his two sons, James R. or John C. Rachels; that he did intend to vest in each of his sons precisely the same estate, to wit, a life estate only, for his own life, in the lands devised to the son; and that he further intended that, at the death of each son, James R. as well as John C. Rachels, the fee simple estate in the lands devised to him for his life only should vest absolutely in the children of such son, as the heirs of his body begotten in lawful wedlock. The language used by the testator, in each of the two devises, is almost identical even to the erroneous use of the word "bequeath," for the word "begotten," in each devise. Construing and interpreting

the devise to James R. Rachels, with reference to all the provisions of the testator's will, and in the light afforded by the context, we have no doubt that the testator intended to use, and did use, the words "heirs of his body, *bequeath* [begotten] in lawful wedlock," in such devise, in the sense of, and as synonymous with, the words "children *bequeath* [begotten] in lawful wedlock," as used by such testator in his devise to John C. Rachels. In other words, it is clear, we think, from all the provisions of the will, that the children of each son were intended by the testator to be the ultimate objects of his bounty, in the lands devised to such son for his life only, and, after his death, to his children as the heirs of his body begotten in lawful wedlock. In *Doe v. Jackman* (*supra*) it was held that the rule in Shelley's case will not, in any case, be allowed to override the manifest intention of the testator, where such intention is neither unlawful nor inconsistent with established rules of law. Whenever, as in the case now before us, it is certain that the term *heirs* is used with the intention that they should take as children or as purchasers, the will should be so construed. (*Rapp v. Matthias*, 35 Ind. 332; *Brown v. Harmon*, 73 Ind. 412; *Clifford v. Farmer*, 79 Ind. 529; *Jones v. Miller*, 13 Ind. 337. See, also, *Hileman v. Bouslaugh*, 13 Pa. St. 344.)

In the case in hand, we are of opinion that the rule in Shelley's case cannot be allowed to override the manifest intention of the testator, in devising the lands in controversy; that, by such devise, James R. Rachels, through whom appellee derives his title, took only a life estate, for his own life, in such lands; and that, under such devise, after the death of James R. Rachels, the appellants, as his children and heirs of his body, begotten in lawful wedlock, became and were the owners in fee simple of such lands, and entitled to the possession thereof. The finding of the trial court, therefore, was not sustained by sufficient evidence, and was contrary to law; and for these causes appellants' motion for a new trial ought to have been sustained.

The judgment is reversed with costs, and the cause remanded for a new trial.

CARROLL vs. BONHAM.

[42 New Jersey Equity, 625.]

NUNCUPATIVE WILL.

Where a decedent lived nine days after making a nuncupative will, and possessed the capacity meanwhile to execute a written one, and could have made such written will, the nuncupative one cannot be sustained.

APPEAL from decree of Hunterdon Orphans' Court refusing to admit to probate an alleged nuncupative will.

Voorhees & Cotter, for appellant.

R. S. Kuhl, for respondent.

THE ORDINARY. Asher W. Carroll, the appellant, propounded for probate in the Orphans Court of Hunterdon County an alleged nuncupative will of his sister, Mary Ann Bonham, late of that county, deceased, who was the wife of the respondent, Moses Bonham. The alleged nuncupation was made on the 9th day of April, 1886. Mrs. Bonham was then living with her husband, at their home in Hunterdon county. She was ill, and continued to be so until she died, on the 18th of the same month. The alleged will was offered for probate by petition on the 2d of June, 1886. After hearing the matter upon due notice, the Orphans Court decreed that the proof was not satisfactory, and dismissed the petition, without costs. By the supposed will, Mrs. Bonham attempted to dispose of personal property of more than the value of \$80. But both previously and subsequently she attempted to dispose of other parts of her personal property. The statute provides that a verbal will (it does not extend to those made by soldiers in actual military service, or mariners or seamen at sea, disposing of their movables, wages, and personal estate) to be valid must, if the property exceed the value of \$80, be proved by the oaths of three witnesses, at least, who were present at the making thereof; and it must be proved that the testator or testatrix, at the time of pronouncing the will,

bade the persons present, or some of them, bear witness that such was his or her will, or words to that effect. It provides, also, that such will must have been made in the time of the last sickness of the testator or testatrix, and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of the will, except where he or she was surprised or taken sick, being from his or her own house, and died before he or she returned to the place of his or her dwelling. (Rev. p. 1245.) It is well established that the term "last sickness" in the foregoing provisions is not to be construed as signifying merely the illness, without regard to its duration, which terminated in the alleged testator's death, but as meaning *in extremis*. (*Prince v. Hazleton*, 20 Johns. 502; *Yarnall's Will*, 4 Rawle, 46; 1 Redf. Wills, 185.) That is, the law contemplates sudden and severe illness immediately preceding physical dissolution, when there is neither time nor opportunity to make a written will, and therefore, in such case, if there is to be a will, it must of necessity be a merely verbal one. Blackstone says that the legislature has provided (by the act of which ours is a transcript) against any frauds in setting up nuncupative wills, by so numerous a train of requisites that the thing itself has fallen into disuse, and is hardly ever heard of but in the only instance where favor ought to be shown to it—when the testator is surprised by sudden and violent sickness. (2 Black. Com. 501.) A nuncupation can only be sustained when it is the result of sheer necessity.

If the decedent could have made a testamentary disposition in the way prescribed by statute, a nuncupative one will be of no avail. In the case under consideration, it would seem that the decedent deliberately selected the nuncupative method and made the nuncupation, not because she had not time to make a written will (she had such time), but because she was under the impression that a verbal one, if made in the presence of three witnesses, was, whenever made, whether in sickness or health, equally valid with one made according to the statute. The case of *Hebden's Will* (5 C. E. Gr. 473), referred to by the appellant's counsel, sheds no light upon this. There

the only question was whether a will drawn by an attorney at the request of the testator and pursuant to his instructions, a few hours before the death of the latter, but not executed—the execution thereof being postponed by the testator until the Christian name of a legatee could be ascertained, and the testator should feel stronger—could be admitted to probate as a nuncupative will. In the case in hand the testatrix was not *in extremis*; she lived nine days after the making of the alleged nuncupation, and, in fact, had testamentary capacity for several of those days. There was no necessity for making a nuncupative will. She could have made a written one. The proof of this fact is clear. The decree of the Orphans Court will be affirmed, but without costs.

A Nuncupative Will must be Oral.—A nuncupative will is defined to be “an oral will declared by testator *in extremis*, or under circumstances considered equivalent thereto, before witnesses, and afterwards reduced to writing.” 2 Bouv. L. Dict. 319; 4 Kent’s Com. 576; 2 Black. Com. 500; 1 Jarm. 180, 186.

But prior to the statute of 1 Victoria, c. 26, § 39, and recent American statutes, which require the same formalities in the execution and attestation of wills of personalty as in devises of realty, the courts allowed imperfectly executed testamentary writings to take effect as nuncupative dispositions of personalty, where it appeared that the testators intended them to operate in the form in which they were found, and that the failure to completely execute arose from some reason other than a purpose to abandon. *Read v. Phillips*, 2 Phillim. 123; *In re Francis Lamb*, 4 No. Cas. 561; *Gaskins v. Gaskins*, 3 Ired. L. 158; *Watts v. Public Administrator*, 4 Wend. 168; *Nutt v. Nutt*, 1 Freem. Ch. 128; *Ex parte Henry*, 24 Ala. 688; *Devecmon v. Devecmon*, 43 Md. 335; *Brown v. Tilden*, 5 Har. & J. 371.

As where execution was delayed merely from habits of procrastination, and sudden death from apoplexy ensued. *Warburton v. Burrows*, 1 Add. 383. Or where execution was prevented by bodily weakness. *Thomas v. Wall*, 3 Phillim. 28. Or duress. *L’Huile v. Wood*, 2 Lee’s Ecc. Cas. 22. Or sudden incapacity. *Lamkin v. Babb*, 1 Lee’s Ecc. Cas. 1. And supervening mental inability or insanity. *Guthrie v. Owen*, 2 Humph. 202; s. c., 36 Am. Dec. 311; *Hoby v. Hobby*, 1 Hagg. Ecc. 146. And in general wherever it was rendered impossible by the so-called act of God. *Scott v. Rhodes*, 1 Phillim. 12; *In re James Taylor*, 1 Hagg. Ecc. 641; *Masterman v. Maberly*, 2 Id. 285.

So also instructions for making a will, reduced to writing by an attorney, or a draft prepared in conformity to testator's intentions, were held entitled to probate where the completion of the instrument was prevented by sudden death, incapacity, &c. *Castle v. Torre*, 2 Moo. P. C. 133; *Goodman v. Goodman*, 2 Lee's Ecc. 109; *In re Bathgate*, 1 Hagg. Ecc. 67; *Lewis v. Lewis*, 3 Phillim. 109; *Sikes v. Snarth*, 2 Id. 851; *Robinson v. Chamberlayne*, 2 Lee's Ecc. 129; *Huntington v. Huntington*, 2 Phillim. 313; *Allen v. Manning*, 2 Add. 490; *Boofter v. Rogers*, 9 Gill, 44; *Parkison v. Parkison*, 12 Smed. & M. 672; *Phoebe v. Boggess*, 1 Gratt. 129; *Mason v. Dunman*, 1 Munf. 456. And the writing was proved to contain the final intention of the deceased. *Beatty v. Beatty*, 1 Add. 154; *Roose v. Mouldsdales*, Id. 129; *In re Robinson*, 1 Hagg. Ecc. 643; *In re Herne*, Id. 222; *Walker v. Walker*, 1 Merv. 508; *Braggs v. Dyer*, 3 Hagg. 207; *Elsden v. Elsden*, 4 Id. 183; *Gillow v. Bourne*, Id. 192; *Theakston v. Marson*, Id. 290; *Abbot v. Peters*, Id. 380. The continuance of such intention being essential to its vitality. *Boofter v. Rogers*, 9 Gill, 44; *Selden v. Coalter*, Va. Cas. 553; *Brown v. Shand*, 1 McCord, 409; *Public Administrator v. Watts*, 1 Paige, 347.

But the courts always viewed such instruments with suspicion. *Wood v. Medley*, 1 Hagg. Ecc. 645; *Reay v. Cowcher*, 2 Id. 249; *Beatty v. Beatty*, 1 Add. 154; *Montefiore v. Montefiore*, 2 Id. 354; *Frierson v. Beall*, 7 Ga. 848; *Plater v. Groome*, 8 Md. 134; *Jones v. Kea*, 4 Dev. L. 301; *Ex parte Henry*, 24 Ala. 688. And in proportion to the incompleteness of the document, demanded a higher degree of evidence. *Harris v. Bedford*, 2 Phillim. 177; *Stewart v. Stewart*, 2 Moo. P. C. 193; *Theakston v. Marson*, 4 Hagg. Ecc. 290.

An incomplete paper remaining in the custody of the testator raised a presumption of some further intention in regard to it, and before the court would recognize its testamentary character, this presumption had to be overcome. *Harris v. Bedford*, 2 Phillim. 177; *Beatty v. Beatty*, 1 Add. 154; *Doker v. Goff*, 2 Add. 42.

But the more modern doctrine is that a nuncupative will can be made only by spoken words or by signs, and that if the words be reduced to writing by the testator, or by some one else at his request, they lose their nuncupative character. *In re Hebden's Will*, 20 N. J. Eq. 473; *Reese v. Hawthorn*, 10 Gratt. 548; *Stamper v. Hooks*, 22 Ga. 603; *Hunt v. White*, 24 Tex. 643; *Ellington v. Dillard*, 42 Ga. 361; *Porter's Appeal*, 10 Penn. St. 254.

And it seems that under the modern statutes and rulings even verbal instructions for drawing up a written will cannot be admitted to probate as a nuncupative will. *Dockum v. Robinson*, 26 N. H. 372.

Who may make a nuncupative will.—By the Statute of Frauds the privilege of making nuncupative wills was restricted to—(a.) soldiers in

actual military service, (b.) mariners at sea and (c.) persons in their last sickness. 29 Charles II, c. 3, § 19.

Similar restrictions have been imposed by the legislatures of most of the American States. 1 Redf. on Wills, 187; 4 Kent's Com. 517, note c.

But in Michigan, Iowa, New Mexico and Arizona, a verbal will may be made by any person and at any time. Stimson's Am. Stat. Law (Jan. 1, 1886), § 2702, C.

(a.) **Soldiers in Actual Service.**—The words "in actual military service" have been held to confine the privilege of making nuncupative wills to those soldiers who are on an expedition. Drummond v. Parish, 3 Curt. 531.

If one having enlisted, but still remaining in camp with his regiment in the State where it was raised, make a nuncupative will, it is invalid; though if afterwards he be in the enemy's country actually exposed to the perils of warfare, and should adopt the will previously made, it may be admitted to probate. Van Deuzer v. Gordon, 39 Vt. 111.

He may then properly be considered in *expeditione*, the term expedition not being confined to that movement of the troops which immediately precedes the actual shock of battle. Leathers v. Greenacre, 53 Me. 578.

For, provided the testator be in a part of the country where active operations are constantly going on, he may make his nuncupative will in camp; and if, soon after, he go upon a raid, is captured and dies in prison, probate will be allowed. Botsford v. Kranke, 1 Abb. Pr. (N. S.) 112; Leathers v. Greenacre, 53 Me. 561.

It is immaterial whether the expedition is invading the country of an enemy or whether it be sent to quell an insurrection in the testator's own State. Van Deuzer v. Gordon, 39 Vt. 111.

One who is taken sick on the march and is carried to the hospital, is in actual military service. Gould v. Safford, 39 Vt. 498; s. c., Redf. Am. Cases on Wills, 694.

But a soldier at home on furlough can not make a nuncupative will. Will of Smith, 6 Phila. 104.

(b.) **Mariners at Sea.**—The terms "mariner," or "seaman," embrace all persons in the naval or mercantile service. They are not limited to those whose duties relate to the sailing of the vessel, but extend to a purser or to a cook. Ex parte Thompson, 4 Bradf. Sur. 154, 158; s. c., Redf. Am. Cases on Wills, 688; In re Hayes, 2 Curt. 338.

A passenger, however, can not make a nuncupative will as a mariner at sea, even though he be a mariner by vocation *en route* to his own ship. Warren v. Harding, 2 R. I. 138.

But in opposition to this, it has been held that a letter written by an invalid surgeon, returning home on board the regular line of steamers,

might be admitted to probate as the will of a seaman made at sea. In *re Saunders*, 11 Jur. (N. S.) 1027; s. c., L. R. 1 P. & D. 16.

In legal parlance, waters within the ebb and flow of the tide are considered at sea. So that the captain of a vessel during a voyage, while lying at anchor in an arm of the sea, may make a nuncupative will. *Hubbard v. Hubbard*, 8 N. Y. 199.

In England a mariner serving on board a public ship permanently stationed in the harbor, was held to be "at sea" within the meaning of the statute. In *re McMurdo*, L. R. 1 P. & D. 540.

And a seaman ashore on leave, and by a serious injury rendered unable to return on board, may make a valid nuncupative will, if he die on shore a few days after. In *re Lay*, 2 Curt. 375.

But the commander of a naval force at Jamaica, who lived with his family at his official residence on the island, could not be construed to be "at sea." *Euston v. Seymour*, 2 Curt. 389.

It has been questioned, both in regard to mariners at sea and soldiers in service, whether their right to make nuncupative wills is unqualified, or whether it is to be exercised only in cases of imminent peril. *Hubbard v. Hubbard*, 12 Barb. 148; s. c., 4 Seld. 196. *Cf. Taylor v. D'Egville*, 3 Hagg. 202; *Bragge v. Dyer*, Id. 207; *King's Proctor v. Daines*, Id. 218; *Weir v. Chidester*, 68 Ill. 453.

Redfield argues that from the very nature of the case it would seem that the peril of life to a soldier or sailor while in actual service is always such as to justify the making of a will in the mode which the law allows them by way of indulgence. 1 Redfield on Wills, 191; *Van Deuzer v. Gordon*, 39 Vt. 111, 119.

(c.) **Persons In Extremis.**—In addition to soldiers and sailors, any one qualified to make a written will may, under certain restrictions, make a nuncupative will. These restrictions, originally imposed by the Statute of Frauds, and substantially re-enacted in America, provide that no nuncupative will shall be good unless made in the last sickness of the deceased, in the house of his habitation, or where he had resided for ten days next before making the will, except where such person, being from his own home, was surprised by sickness, and died before returning to the place of his dwelling. 29 Charles II, c. 3, § 19.

In Utah, it would seem, the statute restricts the privilege to persons in expectation of immediate death from injuries received within twenty-four hours; so, also, in California, Dakota and Montana, from injuries received on the same day. Stimson's Am. Stat. Law (Jan. 1, 1886), § 2702, B, 4.

The meaning of the term "last sickness," as used in the foregoing provisions, is not well settled. Many of the cases construe it as equivalent to *in extremis*, and to denote the sudden and severe illness immediately preceding physical dissolution, when there is neither time nor

opportunity to make a written will. *Yarnall's Will*, 4 Rawle, 46; 26 Am. Dec. 115; *Prince v. Hazleton*, 20 Johns. 502; s. c., 11 Am. Dec. 307. Or when supervening physical or mental incapacity renders it afterwards impossible. *Sadler v. Sadler*, 60 Miss. 251, 255; *In re Corby*, 29 Eng. L. & Eq. 604; *Rouse v. Morris*, 17 Serg. & R. 331; *Huse v. Brown*, 8 Me. 167; *Gwin v. Wright*, 8 Humph. 639.

Probate of nuncupative wills has been refused where the testator did not die until two months after. *Jones v. Norton*, 10 Tex. 120. And in other cases where he survived thirty days. *Ellington v. Dillard*, 42 Ga. 361. Nine days. *Yarnall's Will*, 4 Rawle, 46; s. c., 26 Am. Dec. 115. Six days. *Prince v. Hazleton*, 20 Johns. 502; s. c., 11 Am. Dec. 307; *Morgan v. Stevens*, 78 Ill. 287. Five days. *Reese v. Hawthorn*, 10 Gratt. 548. And four days. *Haus v. Palmer*, 21 Penn. St. 296.

Some cases go so far as to deny probate to a nuncupation made only one day. *Werkheiser v. Werkheiser*, 6 Watts & Serg. 184; *Sykes v. Sykes*, 2 Stew. 364; *O'Neill v. O'Neill*, 33 Md. 569. Or even one hour before death. *Porter's Appeal*, 10 Penn. St. 254.

On the other hand, there are good authorities which hold that a nuncupative will made in the time of the last sickness is not invalid because the testator may have had time, opportunity and capacity to reduce it to writing. *Harrington v. Stees*, 82 Ill. 50; s. c., 25 Am. Rep. 290; *Johnston v. Glasscock*, 2 Ala. (N. S.) 242; *Nolan v. Gardner*, 7 Heisk. 215; *Page v. Page*, 2 Rob. 424; *Sampson v. Browning*, 22 Ga. 293.

Although the statute provides that if a nuncupative will be made by one away from home, or from the place wherein he had last resided for ten days or more, it is essential to its validity that the testator be surprised by sickness, probate has been allowed where one was very unwell when he began his journey, inasmuch as he was afterwards taken more dangerously ill and died at the place where the will was made. *Marks v. Bryant*, 4 Hen. & Munf. 91.

Testamentary Intention Necessary.—To constitute a valid nuncupation, there must be a present intent to make a will, which intent should be distinctly indicated by the testator, either by calling upon some of the persons present to take notice that he is about to make his will, or by some act clearly showing that his words are intended to be testamentary. *Broach v. Sing*, 57 Mass. 115; *Meisenhelter's Will*, 15 Phila. 651; *Winn v. Bobb*, 3 Leigh, 140; s. c., 23 Am. Dec. 258; *Sykes v. Sykes*, 2 Stew. 364; s. c., 20 Am. Dec. 40; *Arnett v. Arnett*, 27 Ill. 247; *Dockum v. Robinson*, 26 N. H. 372; *Bennett v. Jackson*, 2 Phillim. 190; *Biddle v. Biddle*, 36 Md. 630; *Brown v. Brown*, 2 Murph. 350; *Lucas v. Goff*, 38 Miss. 629; *Parsons v. Miller*, 2 Phillim. 194; *Sampson v. Browning*, 22 Ga. 293; *Babineau v. Le Blanc*, 14 La. Ann. 729; *Sykes v. Sykes*, 2 Stewart, 364; s. c., 20 Am. Dec. 40; *Garner v. Lansford*, 12 Smed. & Marsh. 558; *Kelly v. Kelly*, 9 B. Mon. 558; *Ridley v. Coleman*, 1 Sneed, 616. *Contra*, *Woods v. Ridley*, 27 Miss. 119.

The person making the nuncupation must, of course, himself understand the nature of his act. *Gibson v. Gibson*, Walk. (Miss.) 364.

No set form of words is necessary. Any words, however imperfectly uttered, that convey to the minds of those addressed the idea that the testator desires them to bear witness to the disposition he is making of his property, will be sufficient. *Parkison v. Parkison*, 12 Smed. & Marsh. 678; *Harrington v. Stees*, 82 Ill. 50; *Yarnall's Will*, 4 Rawle, 46; s. c., 26 Am. Dec. 115.

And though a form be prescribed by statute, any words, such as "I wish to make a disposition of my effects," will be deemed a compliance with the law. *Baker v. Dodson*, 4 Humph. 342; s. c., 40 Am. Dec. 650.

An appealing look to the testator's father, and the remark, "You see my father acknowledges it," has been held a sufficient calling of the persons present, or some of them, to bear witness to the will. *Parsons v. Parsons*, 2 Greenl. 298; *Baker v. Dodson*, 4 Humph. (Tenn.) 342.

But merely looking at the witnesses while declaring one's will is not sufficient of itself, unaccompanied by some such words directing them to take notice of the testamentary act. *Meisenhelter's Will*, 15 Phila. 651.

The words must be spoken when all the witnesses are present; the declaration to one witness on one day and to another on the next day is not a sufficient bidding of the persons present to bear witness. *Weeden v. Bartlett*, 6 Munf. 123; *Wester v. Wester*, 5 Jones L. 95.

It is necessary that the testamentary capacity of the deceased, and the *animus testandi*, appear by the clearest and most indisputable testimony. *Dorsey v. Sheppard*, 12 Gill & J. 192; s. c., 37 Am. Dec. 77; *Yarnall's Will*, 4 Rawle, 46; s. c., 26 Am. Dec. 115; *Morgan v. Stevens*, 78 Ill. 287; *Gibson v. Gibson*, Walker (Miss.), 364.

When made in answer to interrogatories, stricter proof of spontaneity and volition is required than in ordinary cases. *Dorsey v. Sheppard*, 12 Gill & J. 192; s. c., 37 Am. Dec. 77.

And where the words were drawn from the testator by one whose interest it was to establish them as a will, they did not constitute a valid nuncupation. *Brown v. Brown*, 2 Murph. 350.

And if any doubt remain as to the spontaneity of the act, the testamentary intention or capacity, probate will be refused. *Dorsey v. Sheppard*, 12 Gill & J. 192; s. c., 37 Am. Dec. 77.

A nuncupative will can not be proved by a witness interested in its being established, though he did not acquire his interest until after the will was published. *Gill's Will*, 2 Dana, 447. For the evidence produced to establish a nuncupative will is more strictly examined by the court than in the case of a will in writing. *Lemann v. Bonsall*, 1 Addams, 389.

What may Pass by Nuncupative Will.—In the absence of statutory authority, real estate can not be devised by nuncupative will. *Smithdale v. Smith*, 64 N. C. 52; *Palmer v. Palmer*, 2 Dana, 390; *Pierce v. Pierce*.

46 Ind. 86. And where a statute declares that one may so dispose of "property," the term is construed to extend to personalty only. *Moffett v. Moffett* (Sup. Ct. Tex. 1887), 4 So. W. Rep. 70.

In Georgia, however, and in New Mexico, both realty and personalty may pass by nuncupative will. Georgia, Code of 1882, § 2482; New Mexico, Compiled Laws of 1884, § 1379.

There are in several States statutory limitations upon the amount of property that may be disposed of by a nuncupative will, duly executed, ranging from \$100, in Indiana, to \$1,000, in California. And when not duly executed, it may in some States pass petty sums from \$30 to \$300. *Stimson's Am. Stat. Law* (Jan. 1, 1886), § 2705, § 2708, note a.

If, however, a greater amount be bequeathed, the will is void only as to the excess. *Mulligan v. Leonard*, 46 Iowa, 692.

A nuncupative will can not supersede a written will, but may dispose of lapsed legacies, or such portion of the personal estate as the testator may, by fraud, have been induced to bequeath by a prior written will, or of an unbequeathed residue. *Stonywel's Case*, Th. Ray. 384.

The Words Must be Committed to Writing.—The substance of the testamentary words must be reduced to writing within the time specified by the statute, and be shown to and approved by each of the attesting witnesses. *Welling v. Owings*, 9 Gill, 467.

The time within which this must be done varies under different statutes from three to sixty days. *Stimson's Am. Stat. Law*, § 2704.

The instrument propounded as a nuncupative will must be clearly shown to contain the true substance and import of the alleged nuncupation. *Yarnall's Will*, 4 Rawle, 46; s. c., 26 Am. Dec. 115.

But the exact words need not be reproduced. *Starrs v. Mason*, 32 La. Ann. 8. *Of. Landry v. Tomatis*, 32 La. Ann. 118.

If, in committing the words to writing, an independent and distinct part be omitted, it will not vitiate the whole will. The rest will stand. *Marks v. Bryant*, 4 Hen. & Munf. 91.

Number of Witnesses Required.—In the absence of statutory provision, no particular number of witnesses is requisite to verify a nuncupative will. All that the court demands is to be satisfied by sufficient evidence as to the substance of the last testamentary request. *Ex parte Thompson*, 4 Bradf. Sur. 154, 156.

In most of the American States, however, this is regulated by statute, many of them requiring two witnesses, others three; but in Alabama there is no number specified. *Stimson's Am. Stat. Law*, § 2708.

Statutes Concerning, Strictly Construed.—It has been seen from the foregoing statement that the whole subject of nuncupative wills is largely statutory; and although in some cases it has been held that a substantial

compliance with the requirements of the statute is sufficient (*Ridley v. Coleman*, 1 Sneed, 616; *Gwin v. Wright*, 8 Humph. 639; *Mulligan v. Leonard*, 46 Iowa, 694; *Arnett v. Arnett*, 27 Ill. 247), yet nuncupative wills have never been favored by the courts, and the prevailing doctrine is that the statutes relating to them are to be strictly construed. *Morgan v. Stevens*, 78 Ill. 287; *Gibson v. Gibson*, Walker (Miss.) 864; *Dorsey v. Sheppard*, 12 Gill & J. 192; *Yarnall's Will*, 4 Rawle, 46; *Biddle v. Biddle*, 36 Md. 630; *Taylor's Appeal*, 47 Penn. St. 31; *Lucas v. Goff*, 33 Miss. 629; *Mitchell v. Vickers*, 20 Tex. 377; *Parsons v. Miller*, 2 Phillim. 194; *Bennett v. Jackson*, 2 Phillim. 190.

However, a nuncupative will which makes no bequests, but merely appoints an executor, is not subject to the provisions of the Statute of Frauds. *Dorsey v. Sheppard*, 12 Gill & J. 192.

MATTER OF THE ESTATE OF OERTLE.

[34 Minnesota, 173.]

LIFE ESTATE IN PERSONALTY.—CHARGE THEREON.

A testator by his will devised and bequeathed all his real and personal property to his wife for life, and provided that at her death any and all of the property and estate so granted, "or any part of the same then left by her," should be divided among his children. The will also contained a provision, as follows: "I make this a condition, that my said wife shall, out and from said property left her, provide for the maintenance and education of my children." A power to sell and convert the property is also given to the executors. *Held*, that upon his decease a life estate in the realty vested in the wife and a remainder in fee in the children, and in like manner similar interests were created in the personalty, and in case of sales the devisees or legatees would take similar interests in the proceeds. *Held*, also, that by the terms of the will an implied power of disposition is given to the widow of so much of the capital fund or *corpus* of the estate as may be reasonably necessary for her own support and the maintenance and education of the children after first applying the income thereto; that the provision for the widow is made in consideration that she shall so provide for the children from the property left her, and that for such purpose, as well as her own support, the income is the primary fund.

APPEAL from a judgment of the District Court. The opinion states the case.

G. S. Ives, for appellant.

C. R. Davis and *Sumner Ladd*, for respondent.

VANDERBURGH, J. The legal questions involved in this case arise upon the construction of the terms of the will of Charles Oertle, deceased, which, after provisions for the payment of debts, disposes of all the residue of his real and personal estate as follows: "I give, bequeath and devise to my beloved wife, Josephine, all my real estate and personal property, without exception, of which I may be possessed at the time of my death, . . . to hold and possess during the term of her natural life, for her own exclusive use and benefit. After the death of my said wife, any and all of the property and estate mentioned above, and which, or any part of the same then left by her, shall be divided among my children equally, share and share alike. As a special provision of this my last will and testament, I make this a condition that my said wife shall, out and from said property left her, provide for the maintenance and a good education of my children. And I hereby make, constitute, and appoint Otto Winterer and Louis Horst executors of this my last will and testament, with power to sell and dispose of all the property, both real and personal, at public or private sale, at such time or times, and upon such terms, and in such manner, as to them shall seem meet."

The Probate Court adjudged and determined that the surviving wife was entitled to a life estate only in the property real and personal, and further ordered that, before taking possession thereof, she execute a bond, to be approved by the court, for the safe keeping and faithful accounting by her of the property or capital fund received by her, to the end that the same might be turned over unimpaired to the children of the testator. Upon appeal, the judgment of the Probate Court was so far modified that it was ordered that the widow should

"have power and authority to use, consume, and expend such part and portion of said property as may be necessary for her exclusive use and benefit during the term of her natural life, and to provide for the maintenance and good education of said children; but that said executors have the sole and exclusive power to sell any of said property at any time during her life; and that in case of such sale they deliver the proceeds thereof to her, and take her receipt therefor, and file the same in the office of said judge of probate." In place of the bond required by the Probate Court, it was ordered, upon her consent, that the widow file a bond with sufficient sureties for the maintenance and education of the children, and that an inventory of the property, real and personal, turned over to her by the executors, receipted by her, be also filed with that court. It was further ordered that, upon her death, all of the property, or any part of the same left by her, or the proceeds thereof, be divided among the children, share and share alike.

The questions involved require a careful consideration of the several clauses of the will. A power of sale is vested in the executors, to be exercised in their sound discretion. They are, however, given no other authority or control over the property, and have no active trust to execute in or about the same. They have simply a naked power of sale, and the title passed subject to the exercise of such power. (*Tobias v. Ketchum*, 32 N. Y. 319, 329.) As respects the real property, a life estate vested in the wife, and a remainder in fee in the children, subject to be defeated by a sale. (Gen. St. 1878, c. 45, §§ 13, 33; *Ackerman v. Gorton*, 67 N. Y. 63.) The same rule is applicable to the personalty; and interests for life and in expectancy may be created and limited therein in the same manner. (2 Kent, *353; 4 Kent, *282; *Burleigh v. Clough*, 52 N. H. 267, 278; *Sampson v. Randall*, 72 Me. 109.) In case of a sale of the property, the tenant for life and devisees or legatees in remainder would take the same interests in the proceeds, respectively, as they had in the property. The income would go to the widow, and the principal at her death to the children. (*Ackerman v. Gorton*, *supra*.)

The general rule applicable to the construction of wills is that the intention of the testator, as collected from the whole instrument, is to govern, provided it be not inconsistent with the rules of law. The purpose of the testator in this case was that his property should be used and preserved for the exclusive benefit of his family. Any construction which would permit any part of the estate to be diverted, for the benefit of strangers to his blood or affections, is inadmissible unless necessarily resulting from the terms of the will. To effect this purpose, the general scheme of testamentary disposition appears to have been to give to his surviving wife a life estate in all his property, real and personal, with the right to enjoy the use and possession thereof, and to make a future provision for the children through an equal distribution thereof among them at her death, with a superadded provision for the support and education of the children.

1. The express provision or limitation of a life estate, with remainder over, so plainly defines the nature of the estate and interest intended to be given to the widow that the subsequent clauses cannot be construed as enlarging it into a fee, though the language used therein may create a charge or power of disposition in certain contingencies upon or over the capital fund. The general rule is stated by Chancellor Kent as follows; "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee." (4 Kent, *535.) "Words of implication do not merge or destroy an express life estate, unless it becomes absolutely necessary to uphold some manifest general intent." (Id. *319; *Burleigh v. Clough*, 52 N. H. 267, 277.) This was the common-law rule, under which a devise to one generally, without words of inheritance, or otherwise indicating an intention to grant a greater interest, passed an estate for life only. An estate thus given generally, with a power of disposition, by implication carried the fee. But then, and now

since the statute, an intention to convey a less estate, expressed or clearly implied, will control. (4 Kent, *537; Gen. St. 1878, c. 47, § 2; *Jackson v. Robins*, 16 John. 537, 558, 559; *Johnson v. Battelle*, 125 Mass. 453; *Stuart v. Walker*, 72 Me. 145.)

The contention that in this case the widow took any greater interest or estate than that of a tenant for life cannot be supported; that is to say, the authority to use or dispose of any part of the property or principal, implied from the language of the will, or the charge therein imposed for the support of the children, is the grant of a power and not of property. (*Herring v. Barrow*, L. R. 13 Ch. Div. 144.)

2. In the clause embracing the gift of the remainder to the children on the death of the wife, we find these words, "and which, or any part of the estate and property then left by her, shall be divided among my children." This clearly implies a power to use some part of the principal or capital, if it should be found necessary, for the support of the widow and the maintenance and education of the children, so long as provision for such purpose should be reasonably necessary. This construction is warranted from the language in furtherance of the general purpose of the testator in making provision for his family. The use of such words in a devise after the limitation of a life estate has given rise to a considerable discussion in the courts, which seem more or less divided in opinion as to the effect to be given them. In *Blanchard v. Blanchard* (1 Allen, 223), the court thought that the words "that may be left at the death" of the life tenant added nothing, and meant simply the property left after the life estate had terminated; while the same court, in *Paine v. Barnes* (100 Mass. 470), concede that under the authorities the words, "if anything should remain," in a like case, implied a power of disposition by the life tenant. So, in *Johnson v. Battelle* (125 Mass. 453), the words, "whatever of said estate remains unexpended," implied a similar power of disposition, if it appeared necessary for the support of the life tenant. In *Green v. Hewitt* (97 Ill. 113, 117), the words, "whatever remains," were referred to the anticipated condition of per-

sonal property when turned over to the remainderman, some part of which would necessarily be worn out, lost, or consumed in the natural course of things during the tenancy of the first taker.

The construction in each case will, of course, turn largely upon the peculiar language used and its connection. Thus, in *Martin v. Eaton* (57 N. H. 154), the words, "remaining property," used after provision for payment of debts and erection of grave-stones, gave no additional authority to the life tenant. The construction in *Green v. Hewitt* was doubtless too narrow, because, with the exception of items of perishable property, which it might, perhaps, be the duty of the life tenant to sell, convert into money, and invest, the grant of such personal property as might wear out and perish in the using during such tenancy would necessarily imply the right to so wear it out or consume it. (*Martin v. Eaton, supra.*) In some cases, also, good management would require that certain kinds of personal property, as stock or utensils on a farm, should be disposed of and replaced, the property substituted following the course of the original bequest. (*Groves v. Wright*, 2 Kay & J. 347, 351, 352; 1 Schouler's Pers. Prop. § 140.)

But in *Henderson v. Blackburn* (104 Ill. 227, 232), it was held that the words, "if there is anything left," implied a power of disposal of the entire estate, or such part of it as might be necessary for the use of the life tenant. A similar conclusion was reached in *Clark v. Middlesworth* (82 Ind. 240, 246), where the testator devised all his property, real and personal, to his wife during her life, "and at her death, should anything remain, the same to be divided among my heirs at law. So, in *Brandow v. Brandow* (66 N. Y. 401), on the death of the life tenant it was provided that all the estate, real or personal, which might "*be found then*" should be equally divided among the testator's children. There the property was given to the widow for life and she was charged with the duty of caring for and educating the children. She was held entitled to use the *corpus* of the property, if necessary, for the support and education of the minor children. In this case the language, "and which, or any part of the same then left

by her," is sufficient to indicate an intention on the part of the testator to grant the right to use some portion of the *corpus* of the estate, upon the condition that it should be found necessary in order to give effect to the intention of the testator.

3. In respect to the provision for the support and education of the children by the life tenant, it is to be construed in connection with the clauses of the will which we have just been considering. Though the word "condition" is used, it is clear that the obligation on her part to provide for their support and education is a continuing one, at least as long as it should be reasonably necessary. If she consents to take under the will, she is bound by its provisions; and she is required to make such provision "out and from said property left her," in consideration of the gift and devise made to her. She is therefore to use the property for their benefit as well as her own. The property is charged in her hands as tenant for life; and as a devise of the use of the property for life is a devise of the property for such term (*Farmers' Bank v. Moran*, 30 Minn. 165); so a charge upon the property so devised is a charge upon the rents, income and profits issuing therefrom to which the life tenant is entitled. And, besides, the charge, though fastened upon the property in her hands, is also a personal burden upon her. She is required to discharge this duty, and is responsible for it out of the devise or gift made to her. (4 Kent, *540, note c; *Gardner v. Gardner*, 3 Mason, 178, 208; *Taft v. Morse*, 4 Met. 523.) If the property remained unsold—as an improved farm, with stock and utensils, for instance, occupied by the family—the rents and products thereof, if sufficient for the support of all, should be so applied, and their support would thus be provided out of the property.

We think this construction best accords with the purpose of the testator as manifested by the several clauses of the will read together. That is to say, the income is to be applied to the support of the widow and maintenance and education of the children; and in case the same should prove insufficient, so much of the capital fund may be so used as shall be reason-

ably necessary therefor. She is not to use the principal while the income is sufficient. This intention would appear more clearly, perhaps, if the clause providing for the support of the children had immediately followed the devise to the wife; but it makes no difference in the construction of the will. The power to sell and convert the property is conferred on the executors, and not on the widow. This is not inconsistent with her right to appropriate such portion of the capital fund as may be proper. The clause granting this power to the executors operates as a restraint upon the power of disposition by the widow, but the several clauses must be construed together and in subordination to the purpose of the testator as manifested by the entire instrument, and the power given to the executors must be exercised so as to secure to her the benefit and enjoyment of the estate as provided by the will.

4. In such cases it is not the practice to require of the life tenant a bond as a condition of the delivery of the property, nor of its retention, unless there is danger of its being wasted, secreted or removed. But an inventory should be filed, as was directed in this case, and the life tenant, upon a proper showing of real danger, may be called to account and required to give bonds. And doubtless her executors would be liable to account from her estate for any destruction or loss of the principal caused by an abuse of her trust. (2 Kent, *354; 1 Schouler's Pers. Prop. § 152; *Sampson v. Randall*, 72 Me. 109; *Burleigh v. Clough*, 52 N. H. 267, 283; *De Peyster v. Clendinning*, 8 Paige, 295; *Jones v. Simmons*, 7 Ired. Eq. 178.)

The case is remanded, with directions to modify the judgment in conformity with this opinion, and charging the income of the estate primarily with the support and education of the children.

RANDOLPH vs. RANDOLPH.

[40 New Jersey Equity, 73.]

CONSTRUCTION OF A WILL.—EXECUTORS AS TRUSTEES.

The net income of a specified amount was given by a testator to his widow for life, and his executors were instructed to invest one-third of the principal thereof in designated securities, and were given a qualified discretion as to the investment of the balance. They were also directed to set aside from the remainder of the estate a certain amount, "or property which they may deem to be fairly worth that sum," one-half of which should be in safe railroad bonds, or good bonds and mortgages, and the income therefrom should be paid to his children for life, "or to the heirs of any of my children." They were also to "promptly pay or set aside" \$10,000, the income of which should be paid to B. for life, and to B.'s father for his life, should he survive B.; and \$8,000 "shall be set aside and held in trust for each of my grandchildren living at the time of my decease, and shall be paid over to each of them, as he or she shall attain their twenty-second year of age." He then gave the residue of his estate to his surviving children, equally, and appointed his executors.—*Held*, that the executors were to be also trustees of all these funds; that the gift to the children was not within the rule against perpetuities, because the issue of any child dying should be entitled to the parent's share of the income only until the death of all of testator's children, when the principal should be divided; that a grandchild born two days after testator's death took under the gift to each of his grandchildren "living at the time of my decease;" and that, under the residuary clause, the children took the principal of the gifts to the widow and to B. after their estates for life therein had determined.

BILL for construction of will. On final hearing on pleadings and proofs.

J. F. Randolph, for complainant.

H. V. Condict and *Anson Maltby*, of New York, for answering defendants.

THE CHANCELLOR. Theodore F. Randolph, deceased, by his will made August 17th, 1883, among other things provided as follows:

"I also give to my said wife, in lieu of dower, the net income of \$150,000, which amount shall be the first amount taken from my estate. One-third of this amount shall, by my execu-

tors, be invested either in the bonds of the United States, or in the best bonds of a State of the United States that has never defaulted in the payment of its obligations. The remaining two-thirds of the sum thus set aside, that is, the two-thirds of the \$150,000, shall be as securely invested as my executors may decide, but not in less security than in first mortgage railway bonds of established value, and whose stock is of equal issue to the sum of the issue of the first mortgage bonds and has been fully paid in, the purpose being to have any investment for the benefit of my wife, under this provision of my will, of at least double value to the sum invested. At the decease of my wife whatever remains of the above sum of \$150,000, or any accumulation therefrom, shall revert to and become a part of my general estate.

“Second. I order and direct my executors to set aside from the residue of my estate the sum of \$200,000, or property which they may deem to be fairly worth that sum, one-half of which shall be in safe bonds of railway, or bonds and mortgages well secured and paying interest punctually; and the interest, income or receipt of profits arising from this sum of \$200,000 thus set aside, invested and held in trust, shall be paid over quarterly in equal proportion to each of my surviving children, or to the heirs of any of my children. My desire is to put in trust, for the benefit of my children and their immediate heirs, by the above clause, a capital sum, the income of which shall be secured to them through life.

“Third. When the sums hereinbefore named shall have been fully secured to my wife, and to my children, my executors will promptly pay or set aside from the residue of my estate the following sums for the following persons or their benefit: *a.* The sum of \$10,000, the income of which shall be paid semi-yearly to my loved and faithful friend, Bessie L. Hoge, of Richmond, Virginia, and after her decease, her father surviving, the income aforesaid shall be paid to him during his natural life; upon the decease of both, the principal shall revert to my general estate. *b.* The sum of \$3,000 shall be set aside and held in trust, principal and income, for each of my grandchildren living at the time of my decease, and shall

be paid over to each of them as he or she shall reach their twenty-second year of age. c. The sum of \$200 shall be paid to each of my servants who shall have been in my continuous service five or more years.

"*Fourth.* I order and direct that so much of my estate as shall remain to me after the faithful execution of the above provisions and bequests, shall be distributed, share and share alike, to my surviving children."

He then appointed his three sons executors, and added:

"They will fully respect the convenience and wishes of their mother in executing the provisions of this will, so as to give her the least possible care or anxiety."

The questions which have arisen under the will, are whether the executors are trustees of the three funds of \$150,000, \$200,000 and \$10,000, respectively, and the funds of \$3,000 each for the grandchildren; whether it was the testator's intention that all of his grandchildren, as well as his children, should have the income of the \$200,000 fund; whether the principal of the three funds of \$150,000, \$200,000 and \$10,000 are disposed of under the residuary clause of the will, and whether Elizabeth F. Randolph, one of the testator's grandchildren, who was born two days after his decease, is entitled under the gift which he makes of \$3,000 to each of his grandchildren "living at the time of his decease."

It is quite clear, from the language of the will itself, that the testator intended that the sum of \$150,000 should be held in trust and administered by his executors. He expressly devolves upon them the duty of investing it, giving them a certain limited discretion as to the investment of a large part (two-thirds) of it. At the close of the will he directs them to respect the convenience and wishes of the legatee, their mother, in executing the provisions of the will, so as to give her as little care and anxiety as possible. From these provisions a trust in the executors is implied. (*Jones v. Stites*, 4 C. E. Gr. 324; *Parker v. Moore*, 10 C. E. Gr. 228.)

And so, too, a trust in the executors is implied from the provisions in regard to the \$200,000 fund. The executors are required by the will to set aside the sum which is to constitute

the principal of the fund, and in express terms they are required to exercise a certain discretion, at least, as to the sufficiency of the security of half of the sum so to be set aside. The whole provision shows that the testator intended that they should hold the fund in trust.

It is suggested that the gift of the last-mentioned fund is within the rule against perpetuities ; but it is not liable to that objection. The object of the testator in establishing the fund was to secure the income of it to his children for life, in equal shares ; the issue of any of them who should die before the death of his last surviving child to receive the income in the place of the parent until the death of the last survivor of his, the testator's, children. The words "or to the heirs of any of my children," and the words "and their immediate heirs," in the clause under consideration (and by the word "heirs," there he meant issue), are substitutionary. The expressions are used parenthetically, as is apparent from the testator's punctuation. The will is a holograph. In the clause by which the gift is made, he puts a comma after the word "children," and in the explanatory clause, "my desire is," &c., which follows it, he puts one after the word "heirs." The lifetime mentioned in the latter clause is not that of the issue of his children, but the lifetime of the children themselves. On the death of any of the children without issue, the whole of the income will go to the surviving children or child, and the issue of any deceased child or children stirpitably. The testator's children have a vested right to the fund, in equal shares in remainder, after the death of the last survivor of them. Such interest passes to them under the residuary clause of the will, if, indeed, it does not under the clause by which the fund is created.

It is to be observed that, while the testator directs that the principal of the fund set apart for his widow, and the principal of that set apart for Bessie L. Hoge and her father, shall, after the death of the beneficiaries, become part of his general estate, he makes no such provision in reference to the \$200,000 fund. He clearly intended to give that fund to his children, but meant to control it by means of the trust, so as to secure to them the benefit of the interest of it for life, and, in case of the death of

any of them leaving issue, the issue should have the benefit of the interest, in place of the parent, until the death of the last survivor of the testator's children. That he did not mean to die intestate of any part of his property, is evident from the language of the residuary clause of the will.

Though the children are entitled to both the life interest and remainder of the fund, they are not entitled to a division of the fund among them. The trust is not a simple, but a special one, and hence the *cestuis que trust* have not the right to actual possession of the property, and to call upon the trustees to convey the legal estate at their direction. (Lewin on Trusts, 21; *Cooper v. Cooper*, 9 Stew. Eq. 121.) That the testator did not intend that the fund should be divided until the death of the last survivor of his children, is obvious from the fact that he provides that the children of a decedent shall receive interest in the stead of the parent.

The principal of the widow's fund and the principal of the fund for Bessie L. Hoge and her father, pass to the children under the residuary clause. The executors are trustees of the \$3,000 funds for the grandchildren.

Elizabeth F. Randolph, though not born in the lifetime of the testator (she was born two days after his death), is entitled to take under the gift of \$3,000 to each of the testator's grandchildren living at the time of his decease. Under such a provision, a child *en ventre* at the testator's death is included. *Harok on Wills*, 79.

Under the provision that the money shall be paid to the grandchildren as they shall respectively reach their twenty-second year, the money will be payable to them after and so soon as they shall have completed their twenty-first year.

The following note is reprinted from the New Jersey Equity Reports, Vol. 40, by the permission of JOHN H. STEWART, Esq., the Reporter:

NOTE.—A devise to children *living at the time of A.'s decease* was held to include a posthumous child of A. *Whitelock v. Hedden*, 1 B. & P. 243; *Hale v. Hale*, Finch, 50; *Northey v. Strange*, 1 P. Wms. 840; *Clarke v. Blake*, 2 Bro. C. C. 320, 2 Ves. Jr. 673, 2 H. Bl. 399; *Trower v. Butts*, 1 S. & S. 181; *Crook v. Hill*, L. R. (8 Ch. Div.) 773, 778; *Groce v. Ritten-*

berry, 14 Ga. 232; Barker v. Pearce, 80 Pa. St. 173; Laird's Appeal, 85 Pa. St. 339; Bedon v. Bedon, 2 Bail. 231; Pearson v. Carlton, 18 S. C. 56. Contra, Musgrave v. Parry, 2 Vern. 710; Cooper v. Forbes, 2 Bro. C. C. 63; Bate v. Amherst, T. Raym. 63; McKnight v. Read, 1 Whart. 213; Starling v. Price, 16 Ohio St. 29; Burke v. Wilder, 1 McCord's Ch. 551; see Sprackling v. Ranier, 1 Dick. 344; Gardiner's Estate, L. R. (20 Eq.) 647; In re Corlass, L. R. (1 Ch. Div.) 460; Armistead v. Dangerfield, 8 Munf. 20; and, also, Harper v. Archer, 4 Sm. & Marsh. 99, 48 Am. Dec. 472.

So, of a devise to A.'s *children*, who should be living at A.'s death, and one child was born before A.'s death, and one afterwards. Beale v. Beale, 1 P. Wms. 244; see Hyde v. Seymour, 1 Freem. Ch. 42.

So, if a devise to J., in case he should leave no son at the time of his (testator's) death, and a son was born after testator's death. Burdet v. Hopgood, 1 P. Wms. 486; Pearce v. Carrington, L. R. (8 Ch. App.) 969.

So, of a bond to pay £900 to the obligor's daughter, in case he should have no son living at the time of his decease, and a son was born after his decease. Gibson v. Gibson, 2 Freem. Ch. 223, 2 Eq. Cas. Abr. 769; Millar v. Turner, 1 Ves. Sr. 85; see Godfrey v. Davis, 6 Ves. 43.

So, on a bequest to each and every of testator's children born, or thereafter to be born, and who should be living at the time of his death, with interest to be computed from the day of testator's death, the interest was allowed a posthumous child only from the day of its birth. Rawlins v. Rawlins, 2 Cox, 425; see In re Mowlem, L. R. (18 Eq.) 9.

So, of a bequest "to each child that may be born to either of the children of either of my brothers, lawfully begotten." Townsend v. Early, 3 De G., F. & J. 1.

So, of a devise for life to H., remainder to his first son in tail male, &c. Reeve v. Long, 1 Salk. 228; Crisfield v. Stow, 36 Md. 129; Stedfast v. Nicoll, 3 Johns. Cas. 18; Watkins v. Flora, 8 Ired. 374, 18 Ired. 344; Smith v. McConnell, 17 Ill. 141; see McKnight v. Read, 1 Whart. 213; Gillespie v. Schuman, 62 Ga. 252; Gulliver v. Wicket, 1 Wils. 105.

So, of an executory devise. Luddington v. Kime, 1 Ld. Raym. 207.

A gift "to each of the three children of my niece" will not embrace a fourth and posthumous child. Emery's Estate, L. R. (3 Ch. Div.) 300; but see Goodfellow v. Goodfellow, 18 Beav. 356; Spencer v. Ward, L. R. (9 Eq.) 507; Daniell v. Daniell, 3 De G. & Sm. 387; Early v. Middleton, 15 Jur. 367.

The same construction has been given in the case of a devise to *grand-children* living at a designated time. Hall v. Hancock, 15 Pick. 255; Hone v. Van Schaick, 2 Barb. Ch. 488; reversed, 3 N. Y. 538; see Loockerman v. McBlair, 6 Gill, 177; Swift v. Duffield, 5 Serg. & R. 38; Smart v. King, Meigs, 149.

But a devise to great-grandchildren was held not to include a great-

grandchild *in ventre sa mere* at the testator's death. *Freemantle v. Freemantle*, 1 Cox, 248.

A gift was to C. for life, and afterwards to his children then living. C. was unmarried, but had illegitimate children living when the will was executed, of which fact it was assured the testator was cognizant.—*Held*, that such children were excluded. *Warner v. Warner*, 15 Jur. 141.

A trust until the youngest of the children of donor's nephews and nieces who should be *born and living* at donor's death, &c., was held not to include a child *in utero*. *Blosson v. Blosson*, 10 Jur. (N. S.) 1113; 2 De G., J. & S, 665; reversing 10 Jur. (N. S.) 165.

As to a testamentary provision in favor of a child *in ventre*, see *Earle v. Wilson*, 17 Ves. 528; *Medworth v. Pope*, 27 Beav. 71; *Blakiston v. Hazlewood*, 15 Jur. 272; 10 C. B. 544; *In re Lindsay*, 5 Irish Jur. 97.

SWASEY vs. JAQUES.

[144 Massachusetts, 135.]

PECUNIARY LEGACIES.—CONSTRUCTION OF A CLAUSE OF THE WILL.

A testator by his will gave pecuniary legacies to certain persons, and provided that, if any of them "shall die before [my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." One of these legatees died in the lifetime of the testator, leaving as his nearest relatives a brother and three nephews, sons of a deceased brother, all of whom survived the testator. *Held*, that the brother of the legatee was entitled to the legacy, to the exclusion of the nephews.

PETITION by the executor for construction. The facts appear in the opinion.

H. I. Bartlett, for Richard T. Jaques.

D. L. Withington, for the nephews of the testatrix.

FIELD, J. (Omitting a question of practice.) By the tenth article of the will, the testatrix gave pecuniary legacies to certain

persons; and provided that, if any of them "shall die before my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." Matilda Jaques, one of these legatees, died in the life-time of the testatrix, leaving as her nearest relations a brother, Richard T. Jaques, and three nephews, sons of a deceased brother, all of whom survived the testatrix and are now living. The question is whether the words "next of kin" in the will mean nearest blood relations, or include all those relations who would take under the statute of distributions.

In England, this question was settled by *Withy v. Mangles* (10 Cl. & F. 215); *Harris v. Newton* (25 W. R. 228); *Halton v. Foster* (L. R. 3 Ch. 505). The case of *Withy v. Mangles* has been cited by this court in *Houghton v. Kendall* (7 Allen, 72) and *Haraden v. Larrabee* (113 Mass. 430). There are comments upon the case in *Houghton v. Kendall*, but the decision in *Houghton v. Kendall* is in accordance with late English decisions by courts inferior to the House of Lords, and these decisions must be held not to be in conflict with *Withy v. Mangles*.

In *Houghton v. Kendall*, a testator bequeathed to his daughter Sally the income of two thousand dollars, which was to remain in the hands of his executors; and provided that, at her decease, the sum remaining in their hands should be paid "over to the children who may be the surviving heirs of said Sally's body, to be divided in equal shares between them." Sally survived the testator, and died leaving at her death one son and four grandchildren, children of a deceased son. The court say: "When the word 'heirs' is used in a gift of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the person whose 'heirs' they are called." It is unnecessary in the present case to consider under what circumstances the word 'heirs' is to be construed to mean distributees of personalty. (See *Fabens v. Fabens*, 141 Mass.

395, 399; *Merrill v. Preston*, 135 Mass. 451; *Minot v. Harris*, 132 Mass. 528; *Sweet v. Dutton*, 109 Mass. 589.)

Wingfield v. Wingfield (9 Ch. D. 658), *In re Thompson's Trusts* (9 Ch. D. 607), and *Keay v. Boulton* (25 Ch. D. 212), are decisions to the same effect as *Houghton v. Kendall*. The distinction taken between these cases and *Withy v. Mangles* is that the word "heirs" in itself imports succession to property by death; and as the persons who are the heirs of any one deceased are designated by law—which now is statutory law—the heirs must be either those persons who by law would succeed to the real estate, or those who would succeed to the personal estate, of the person whose heirs they are called, if that person had died intestate; and it is said that, if the property is personal, the inference is that those persons are meant who would succeed to personal estate if the owner had died intestate, and who have been sometimes styled the statutory next of kin, or heirs of the personalty. But it is said that the words "next of kin" do not of themselves import "succession *ab intestato*," and, taken alone, mean nothing more than nearest blood relations; and that, unless there is something more in the will indicating that the testator intended statutory next of kin, or that the property should be distributed as intestate property, these words must have their customary meaning. Our statute of distributions includes, among those who take, the husband or wife of the deceased, and permits representation.

The words "next of kin" are not used in the chapter of the Public Statutes concerning the distribution of the personal estate of intestates, but are used once in the chapter concerning the descent of real estate, which, with certain exceptions, regulates the distribution of personal estate, and then the words are "next of kin in equal degree." But the words "next of kin" are used in other provisions of the statutes relating to the administration of estates, and apparently sometimes include all persons who take personal property as distributees of an intestate estate, and sometimes all such persons except the husband or wife. (Pub. Sts. c. 125; c. 130, § 1; c. 135; c. 136, §§ 20, 26–28; c. 143, §§ 12, 13, 20, 23.) The

context and the subject-matter must in each case determine the meaning of the words. There is no general provision that the personal estate of an intestate shall be distributed among the next of kin.

It is certainly difficult to distinguish between the expressions "next of kin," "nearest of kin," "nearest kindred," and "nearest blood relations," and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other. What little recent authority there is beyond that of the English courts supports the English view; and, on the whole, we are inclined to adopt it. (*Redmond v. Burroughs*, 63 N. C. 242; *Davenport v. Hassel*, Busb. Eq. 29; *Wright v. Methodist Episcopal Church*, Hoff. Ch. 202, 213.) There is nothing in this will which controls or modifies the meaning of the words "next of kin."

The decree must be reversed, and a decree entered that the legacy of \$500 given to Matilda Jaques be paid to Richard T. Jaques.

The details of the decree may be settled by a single justice, before whom counsel may be heard upon their application to be allowed counsel fees out of the fund.

So ordered.

WORTHINGTON vs. KLEMM.

[144 Massachusetts, 167.]

EVIDENCE AS TO THE KNOWLEDGE OF THE TESTATOR.—CONTENTS OF THE WILL.

It is not necessary to the validity of a will that it should be read by or to the person executing it; it is sufficient if the court is satisfied, by competent evidence, that the contents of the will were known to and approved by the person executing it, at the time it was executed as a will.

APPEAL from a decree of the Probate Court, allowing an

instrument purporting to be the last will of Ann Klemm. The facts sufficiently appear in the opinion.

J. E. Cotter & C. A. Mackintosh, for appellant.

T. E. Grover, for appellee.

FIELD, J. This will was duly executed, and the testatrix was of sound mind. It appears that she had previously executed a will, and, desiring to make some changes in it, gave instructions to Mr. Cobb to make the changes and "bring the new will to her to be executed." Mr. Cobb "drafted the will according to his instructions," carried it to her, and she signed it "as her will in the presence of the witnesses," who all attested it in her presence. "Mr. Cobb then offered to read it to her, but she declined, saying that he could do so at some other time, and requested him to keep it in his custody, and it remained in his custody until" her "death, and she never read it, nor was it ever read to her." The cause was heard by the court without a jury, and the court found that "the contents of the paper, when Mrs. Klemm signed it, were what she intended they should be, and what she believed them to be, and she believed the instrument to be duly executed as her will." Mr. Cobb received nothing by the will. It is plain that, on such a finding, the will must be allowed, unless the law requires that a will be read by or to the person executing it. Such is not the law; it is sufficient if the court is satisfied, by competent evidence, that the contents of the will were known to and approved by the person executing it at the time it was executed as a will. (*Day v. Day*, 2 Green Ch. 549; *Pettes v. Brigham*, 10 N. H. 514; *Parker v. Felgate*, 8 P. D. 171; *Morrell v. Morrell*, 7 P. D. 68; *Hastilow v. Stobie*, L. R. 1 P. & D. 64; *Cleare v. Cleare*, L. R. 1 P. & D. 655; *Moore v. Paine*, 2 Lee, 595.).

The decree of the Probate Court allowing the will must be affirmed.

Whether the will must be read to the testator.—In ordinary cases where a testator is in health, and his sanity has not been successfully

questioned, it is not necessary to show that the will was read over to him or that he knew the contents of it. The legal presumption in such cases is always in favor of the will, and he who seeks to impeach it must show conclusively that the testator was imposed on, or that there was some mistake whereby he was deceived. *Day v. Day*, 3 N. J. Eq. 549, 551; *Pettes v. Brigham*, 10 N. H. 514. Cf. *Comb's Appeal*, 105 Penn. St. 155, 160; *Mealey's Estate*, 11 Phila. 161, 162.

But if the evidence shows that the testator did not read the will himself, as where it was not in his possession and he had no opportunity, or where he was so weak and low as to be unable to do so, or was blind, or illiterate, and where for any reason his ability to read was doubtful, the burden of proof is then thrown on the proponent, to show that the testator was acquainted with the contents of the instrument and approved it. *Day v. Day*, 3 N. J. Eq. 549, 552; *Billinghurst v. Vickers*, 1 Phil. Ecc. 187; 1 *Swinburne on Wills*, 96; 4 *Burns' Ecc. Law*, 56. Cf. *Blume v. Hartman* (Penn. St., 1887), 8 Atl. Rep. 219.

The proponent, however, need not show an actual reading of the will to the testator, provided he satisfy the court by competent evidence that the contents of the will, at the time of signing it, was what the testator intended it to be. *Day v. Day*, 3 N. J. Eq. 549; *Pettes v. Brigham*, 10 N. H. 514; *Parker v. Felgate*, L. R. 8 Prob. Div. 171; *Morrell v. Morrell*, L. R. 7 Prob. Div. 68; *Moore v. Paine*, 2 Lee, 595. Cf. *Hastilow v. Stobie*, L. R. 1 P. & D. 64; *Cleare v. Cleare*, L. R. 1 P. & D. 655.

Thus, if the fact can be established either by direct or circumstantial evidence so conclusive as to admit of no reasonable doubt, that the last will was truly copied from a previous will, and that the contents thereof was known to the testator, there will be no difficulty in admitting it to probate. *Day v. Day*, 3 N. J. Eq. 549, 554.

So also if it can be shown that the will was substantially in accordance with the instructions of the testator, it may be considered sufficient evidence that he was acquainted with its contents. *Day v. Day*, 3 N. J. Eq. 549, 555.

Likewise where a testatrix has given instructions for her will, and it is prepared in accordance with them, although at the time of execution she is unable to remember what those instructions were and is incapable of understanding what has been written, yet, relying upon her solicitor's having embodied her wishes in proper words, she accepts the paper put before her as her will and directs it to be signed, probate will be allowed. *Parker v. Felgate*, 8 Prob. Div. 171.

MATTER OF THE ESTATE OF GOTZIAN.

[84 Minnesota, 159.]

PROVISION FOR A WIDOW.—ELECTION.—CONSTRUCTION OF THE WORDS “ALL MY ESTATE.”

Where a testator by his will provided, *first*, for the payment of debts, and, *secondly*, gave the homestead premises, and the furniture, and all other personal property connected therewith, to his wife, and directed that, after satisfying these provisions of the will, all the residue of his property, real and personal, should be distributed as follows, viz.: *First*, one equal undivided one-third part to his wife, which he ordered to be given her clear of all incumbrances; and, *second*, the remaining two-thirds to be divided among other relatives: *Held*, that such residue of the realty as well as of the personalty, is by the will required to be first applied to the satisfaction of debts before any of the personalty named in the second bequest can be so applied, in order to secure to the widow the benefit of such bequest as intended by the testator; and that the claim by the widow of her distributive share of the residue of the real estate, which would be subject to its just proportion of the debts, is inconsistent with the scheme of the will, and that it is manifest from the will that the testator contemplated the disposition thereby of the entire estate as enjoyed by him, and therefore the widow was required to elect between such distributive share and the provisions made for her in the will.

THE will of Adam Gotzian, late of the county of Ramsey, deceased, was duly proved and his estate administered in the Probate Court of that county, and application was made for a final decree of assignment and distribution. At the hearing of the application the testator's widow claimed to be entitled to the provision made for her by the will, and also to her statutory share (one-third) of the testator's real estate. The Probate Court held that she could take no more than the will gave her, and entered a decree accordingly. The widow appealed to the District Court, where the appeal was heard by Wilkin and Simons, JJ., and the decree of the Probate Court was reversed, and the cause remanded to the Probate Court with directions to enter a decree assigning to the widow an undivided one-third of the realty under the statute, and also the property devised and bequeathed to her by the will. From this judg-

ment the heirs and the other devisees appeal. The material clauses of the will are as follows :

"First. I order and direct all my lawful debts to be fully paid and discharged.

"Second. After the payment of my debts as aforesaid, I give, devise, and bequeath unto my beloved wife, Josephine Gotzian, our homestead and the grounds or lot of land on which the same is situated, in Lyman Dayton's addition to St. Paul, Ramsey county, Minnesota, including all furniture, goods, chattels and personal property contained in and about our said homestead, including also horses and harnesses and carriages, sleighs, and everything in and about the stable and premises belonging to me. To have and to hold all of said real and personal estate and property unto the said Josephine Gotzian, her heirs and assigns, forever.

"Third. After paying off and providing for the bequests hereinbefore 'first' and 'second' mentioned, I give, bequeath, devise and dispose of the balance of estate and property, of what name and nature soever, in the following manner :

"I give, devise and bequeath an undivided one-third of all the balance, rest, residue and remainder of all my estate and property unto my said wife Josephine Gotzian, which third I hereby order to be given to her free and clear of all claims, liens or incumbrances whatsoever ; to have and to hold said one-third, free and clear of all claims, liens or incumbrances, to the said Josephine Gotzian, her heirs and assigns forever."

The testator then proceeds to dispose of "the remaining two-thirds of my estate and property" to his two nieces, his sister and his two brothers.

Greenleaf Clark and Harvey Officer, for appellants.

C. D. O'Brien and H. C. Eller, for respondent.

VANDEBURGH, J. By the statute in relation to the descent of real property, one equal undivided third of the lands (exclusive of the homestead) of which the testator, Adam Gotzian, was at any time during coverture seized, and to the disposition

of which his surviving wife had duly assented, but subject to its just proportion with the other real estate to the payment of such debts of the deceased as were not paid by his personal estate, descended to and became vested in the respondent, his widow, upon his decease, subject to be defeated by her election to accept the provisions of his will in her favor if intended to be in lieu thereof.

As there is no dispute in respect to the personal property or the homestead, the controversy here relates wholly to the disposition of the residue of the real estate. The testator *first* provides for the payment of his debts; *second*, he devises to his wife "our homestead," meaning the dwelling-house occupied by him and his wife, together with "the grounds or lot on which the same is situated," intending an absolute estate in fee, and also bequeath to her all furniture, goods, and personal property connected therewith, including horses, carriages, etc., "and everything in and about the premises belonging to me;" *third*, after satisfying these provisions of the will, he also gives her "an undivided one-third of all the rest, residue, and remainder of all my estate and property," which third is ordered to be given her "free and clear of all claims, liens, or incumbrances whatsoever." The remaining "two-thirds of my estate and property" is divided into three equal parts, and is so disposed of to other relations.

The widow claims under the will, and, in addition thereto, one-third of the realty under the statute. The appellants insist that these claims are inconsistent, and that a proper case for an election is presented. Their contention is that it clearly appears by the will that the testator intended to include in it what would descend to her, which we may for convenience denominate her "dower," and has made other and more liberal provisions for her in lieu thereof, so that if she takes what is given her by the will, she must necessarily relinquish dower in the lands in question.

Until the act of 1875, abolishing dower and providing estates of inheritance in lieu thereof (Laws 1875, c. 40), the statute required a surviving wife to elect between a devise of lands, or other provisions made for her by the will of her hus-

band, and her dower in his lands, and she was not entitled to both unless it plainly appeared by the will to have been so intended. (Rev. St. 1851, c. 49, § 18; Gen. St. 1866, c. 48, § 18.) It is not questioned that the common law is exactly the reverse; that is, the widow is entitled to both, unless it plainly appears from the will not to have been so intended. She cannot be put to an election between her paramount right of dower and a devise or bequest of something else, unless the intention to exclude the former is disclosed either by express words, or her right of dower be inconsistent with or repugnant to the provisions of the will, so as to disturb or disappoint them. (4 Kent, *58; 2 Story's Eq. § 1088; *Reynolds v. Torin*, 1 Russ. 129.) The repeal of Chapter 48, Gen. St. 1866, by Laws 1875, c. 40, carried with it the statute rule, and left the common law rule in force. As respects cases arising since the act of 1875, the rule must be applied substantially as if the repealed provision had never existed. Being remitted to the common law rule, the court is not warranted in departing from it.

The question in each case is whether it can be gathered from the will that it was the testator's intention that the provisions therein made for her should be in satisfaction of her dower, or a bounty in addition thereto. It is a question of intent, and such intent must be shown by the will, and may be manifested by the clauses of donation, or may appear from the entire frame of the will. And unless the contrary appear from the will, the presumption is that a legacy is intended as a bounty, and not as a purchase or satisfaction of the dower interest of the wife. These general principles are not disputed.

So, also, where the terms of the donation are general, and the testator has not the absolute and exclusive ownership, but his interest is qualified, partial, or undivided in the property, and he uses general words of disposition, as "all my estate," "all my lands," etc., *prima facie* the rule is that he must be taken to intend to dispose only of what he had the power to dispose of; and in order to raise a case of election it must be apparent that he intended to dispose of what he had not the

power or right to dispose of. In such cases the testator's interest in the property is deemed presumptively sufficient to satisfy the terms of the devise; otherwise, however, where particular property is specifically devised. (*Miller v. Thurgood*, 33 Beav. 496; *Thomson v. Bowman*, 29 Cal. 337, 349; *Pratt v. Douglas*, 38 N. J. Eq. 516, 537; 2 Story's Eq. § 1087; 1 Pom. Eq. Jur. § 489; 1 Lead. Cas. Eq. *346.) It must be added, however, as will be readily suggested, that notwithstanding the general words in a devise, it may otherwise appear from the provisions of the will and scheme of testamentary disposition that the testator intended to dispose of the entire estate or property, including interests not his own, so as to put the widow or heir to an election. (*Honeywood v. Forster*, 30 Beav. 14; 1 Lead. Cas. Eq. *348.)

It is manifest that the general rule referred to may be extended too far, and some of the English cases, which have been followed in several of the States, have adopted a construction so technical and restricted as to defeat the obvious purpose of the testator. The presumption that, by the use of general words of donation, he intends strictly to dispose only of what is capable of being disposed of, may be rebutted by the character and terms of the will, and it is therefore a fair question of construction in what sense the words "estate" or "lands" or "property" are used by the testator, whether it is limited to the partial or undivided interest which, in contemplation of law, will be subject to be disposed of under the will after his decease, or is intended to include the entire property owned, possessed, and enjoyed by him in his lifetime. (*McGregor v. McGregor*, 20 Grant, U. C. 450.) Upon a careful consideration of this case, we think the indications are sufficiently manifest from the will that the testator had in mind the disposition of the entire estate as possessed by him at his death, and that he did not mean that the ample and carefully secured provisions given his wife by the will, and exceeding the value of her dower, should be in addition thereto. (*Lord v. Lord*, 23 Conn. 327; *Hickey v. Hickey*, 26 Conn. 261.)

The existing statutes in this State make very liberal allowances to the wife out of the estate of her husband. In addition

to the share in the realty which is not subject to testamentary disposition by him, she is also entitled to certain chattels and special allowances out of the personalty, and to one-third of the residue of his personal estate in cases of intestacy.

Where a testator, as is not unfrequently done, bequeaths to his wife such portion of his estate as she would be entitled to under the statutes of distribution or descent, she takes, as legatee or devisee under the will, such share of his property as she would receive if he had died intestate, and she is not entitled to dower in addition thereto, but is put to an election. (*Warren v. Morris*, 4 Del. Ch. 289, 300, 301; *Kelly v. Reynolds*, 39 Mich. 464; *Adamson v. Ayres*, 5 N. J. Eq. 349.)

The testator has not, in this instance, formally or by express words declared that the respondent is to receive the same share of his estate which the law has allowed in cases of intestacy; but it is evident that he has adopted such statutory provisions as the basis of the distribution of his property in respect to the share of his property which he intended she should receive. These provisions were amplified by giving her the homestead premises absolutely, and, in place of the statutory allowance to the widow of furniture and other chattels (Gen. St. 1878, c. 51, § 1), he gives her all the furniture, etc., and everything about the premises belonging to him; and "one-third" of the residue of his estate clear of incumbrances, including both real and personal property. And in granting her the homestead dwelling, and all the real and personal property connected therewith, we think he intended that it should continue to be possessed and enjoyed by her as it was possessed and enjoyed by him; the whole estate being treated as an entirety by him, and not merely as including that portion thereof which he had the power to dispose of. And we think the same purpose runs through the entire will, so that, as before remarked, the indications are sufficiently manifest from the will that the testator had in mind the disposition of the entire *corpus* of the estate of which he should be possessed at his death.

In respect to her third of the residue, he gives her "an undivided one-third of *all* the balance, rest, residue and remainder

of all my estate and property." This includes both real and personal property, which are blended together in the will, and the whole, if necessary, subjected to the payment of debts. It will be observed, also, from the terms of the will, that the residue referred to is what remains after the debts are paid and the second bequest satisfied; that is to say, the real as well as the personal property, other than mentioned in the second bequest, must be first applied in satisfaction of the debts in order to secure to the widow the full benefit of the second bequest in accordance with the purpose of the testator. But if she is to take as heir, her third of the residue of the realty must, unlike the former estate in dower, bear its just proportion of such debts as are not paid from the personal estate, and here there is or may be a large proportion of the personal property included in the second bequest subject to the payment of debts in the order of distribution provided by law before the realty is liable therefor. The fee of the homestead is also liable to its just proportion thereof. But it is clear that, in case of a deficiency of assets, a different and entirely inconsistent plan and order of distribution is contemplated by the will. The deficiency is not to be ascertained by first applying the personalty, but personalty is preferred to realty, and the realty, with which the widow's third is to share its ratable proportion of the debts (if it contributes at all), must be first applied, and with no rule, or a different one from that provided by the statute for ascertaining the proper proportion of its liability. The same line of argument is applicable measurably to the provision of the will in the third bequest, requiring that the widow's third of the estate, real and personal, should be given her free and clear of incumbrances; but it is unnecessary to pursue it further. She could not be entitled to the full enjoyment of her rights as heir without disturbing the provisions of the will, some of which are clearly inconsistent with such rights. She cannot, therefore, take both. (*In the Matter, &c., of Zahrt*, 94 N. Y. 605; *Dodge v. Dodge*, 31 Barb. 413; *Savage v. Burnham*, 17 N. Y. 561, 577; *Sullivan v. Mara*, 43 Barb. 523.)

It is well settled that a legacy given in lieu of dower does

not abate with other legacies in case the fund is insufficient to pay all. The widow takes the estate which she elects to receive in lieu of dower as purchaser, for which she pays a consideration by surrendering her claim. (*Lord v. Lord*, 23 Conn. 327, 338; *Williamson v. Williamson*, 6 Paige, 298, 305; *Warren v. Morris*, 4 Del. Ch. 289, 302, and cases cited.) It is a circumstance of much significance, therefore, in this case, that the testator has been at special pains to provide that the provision for his wife shall be clear of all incumbrances. The fact is also worthy of attention that the residue of the real and personal estate is united under the designation of "estate and property," and is disposed of together, and one-third of the whole given to her; and it is argued with much force that the principle of the will is equality in respect to the proportionate division of the property, real and personal, intended to be given her, and that it could not have been intended by the testator that the widow should have a disproportionate part of the realty left by him, partly incumbered, and partly expressly ordered to be given her free from incumbrances. (*Reynolds v. Torin*, 1 Russ. 129.) These are indications drawn from the will, which, though not conclusive in themselves, are additional evidence tending to strengthen the conclusion drawn from other clauses of the will, and its general import, that the testator intended to include and dispose of the whole estate possessed by him at his death, and that the provisions therein made for the widow were to be in lieu of her distributive share as heir. (*Dodge v. Dodge*, *supra*.)

The judgment of the District Court is reversed, and that of the Probate Court is ordered to be affirmed.

VAN GIESON vs. BANTA.

[40 New Jersey Equity, 14.]

THE VALIDITY OF THE WILL OF A NON-RESIDENT.

The complainant claimed that, as a residuary legatee, he was entitled to a part of a fund in defendants' hands, under what the complainant insisted was a void bequest. *Held*, that, as the testator was at the time of his death a non-resident (he lived in New York, where the will was proved), and his will had never been proved in this State, nor recorded here, as authorized by the statute, the complainant was not entitled to relief, although the bill states that the fund is under the control of the defendants, who reside in this State and are the executors of the surviving executor of the will by which the bequest was made.

BILL for relief. On final hearing on bill, answer and replication.

C. H. Voorhis, for complainant.

A. Zabriskie, for defendants.

THE CHANCELLOR. The bill is filed by the executor of Margaret Van Gieson, deceased, against the executors of Abraham Westervelt, deceased, for a decree declaring invalid a bequest of \$500 in the will of Garret H. Van Wagoner, deceased, and ordering that one-third of the amount, with its accumulations, be paid to him. By the bequest, the testator intended to create a permanent fund, the interest whereof was to be expended in inclosing, keeping in repair, and improving a designated public burying-ground in Bergen county. The complainant insists that the bequest is not a valid charity, and that therefore those who, under the will, are entitled to the residue of that part of the estate from which the bequest was taken, are entitled to the fund and its accumulations. By the will, the testator, after directing sale of his real estate, and making disposition of one-half of the proceeds thereof, gave, out of the other half of the proceeds, certain legacies, and made the bequest before mentioned, and then gave all the rest and residue of that half to three persons, of whom the com-

plainant's testatrix was one. The testator resided in the city of New York at the time of his death. His will was made and proved there. Only one of his executors, Abraham Westervelt, proved it. He and the other persons named as executors in it are dead. Mr. Westervelt died in this State, where he resided, and his will was proved here by the defendants and the late Abraham O. Zabriskie, his executors. The surviving executors have control of the fund in question. It is enough to say, to dispose of this case, that the complainant has established no title to relief. The will under which he claims has never been admitted to probate in this State, nor filed and recorded here under the provisions of the Orphans Court Act in reference to the filing and recording of foreign wills. (Rev. p. 757.) It cannot be received as evidence of any right of the complainant to the fund, or any part thereof, if the bequests which he seeks to attack were declared invalid. (*Tyler v. Bell*, 2 My. & Cr. 89; *Bond v. Graham*, 1 Hare, 482; *Ryves v. Duke of Wellington*, 9 Beav. 579; *Armstrong v. Lear*, 12 Wheat. 169; *Brown v. Brown*, 4 Edw. Ch. 343; *Campbell v. Sheldon*, 13 Pick. 8.) The validity of the bequest must be decided by the law of the State where the will was made and the testator was domiciled. (*Story Conf. Laws*, § 479, c.) The fact that according to the bill a part of the estate is under the control of the surviving executors of the executor of the will, and that they reside in this State, does not, of itself, give jurisdiction. It is claimed by the complainant that the fund in question is part of the residue of the proceeds of the one-half of the testator's real estate, from which it was taken, and that he is, therefore, under the will, entitled to one-third of the fund. He claims directly under the will, and that, in the administration of the assets under it, he is entitled to the money which he seeks to obtain by this suit. The bill will be dismissed, with costs.

The following note is reprinted from the New Jersey Equity Reports, Vol. 40, by the permission of JOHN H. STEWART, Esq., the reporter:

In *McNamara v. Dwyer*, 7 Paige, 289, jurisdiction was sustained over

a resident of Louisiana, who was temporarily in New York on his way to Ireland, as the administrator of an intestate who died in Ireland, on the application of the next of kin, residing in New York, the bill alleging that the defendant had been appointed administrator in Ireland, had collected the assets of the estate, brought them to this country, and squandered them here. See *Allsup v. Allsup*, 10 Yerg. 282; *Dillard v. Harris*, 2 Tenn. Ch. 196; but see *Mellus v. Thompson*, 1 Cliff. 125; *Dawes v. Boylston*, 9 Mass. 887; *Brownlee v. Lockwood*, 5 C. E. Gr. 239; *Sparks v. White*, 7 Humph. 86; *Brown v. Brown*, 1 Barb. Ch. 189; *Alger v. Alger*, 81 Hun, 471.

In *Caldwell v. Maxwell*, 2 Tenn. 102, an executrix of a testator, who was domiciled and died in Virginia, removed to Tennessee with the effects of the estate, and was held liable to be called to account in the latter State by the legatees, residents also of Tennessee.

In *Gravely v. Gravely*, 20 S. C. 98, an executrix, resident in England, of a testator who had died there, proved the will both in England and in South Carolina. Whether a *cestui que trust* could maintain a suit against him in South Carolina, for misconduct in regard to the investment of the trust fund in England, was held to depend on whether (supposing the testator to have been domiciled in England) there were assets in South Carolina when the suit was brought.

In *Campbell v. Tousey*, 7 Cow. 64, a non-resident executor was held liable, at law, in New York, as an executor *de son tort*, for assets collected in New York. See *Vermilya v. Beatty*, 6 Barb. 429; *Metcalf v. Clark*, 41 Barb. 45; *Marcy v. Marcy*, 32 Conn. 308.

In *Tunstall v. Pollard*, 11 Leigh, 1, an executor who had taken probate of his testator's will and letters testamentary in England, and collected the assets and brought them into Virginia, but never qualified as executor in Virginia, was held liable to be sued by the legatees, in the Court of Chancery of Virginia, for an account of his administration and for the unpaid legacies. See *Dickinson v. Hoopes*, 8 Gratt. 414; *Colbert v. Daniel*, 82 Ala. 814; *Montalvan v. Clover*, 32 Barb. 190.

In *Olney v. Angell*, 5 R. I. 198, the legatees of a will made in Wisconsin, by a testatrix domiciled there, were held capable of maintaining a suit in Rhode Island, against an administrator of the testatrix, appointed in Rhode Island, for an account of the assets which had come into defendant's hands in Rhode Island, and for the amount of their legacies. See *Tourton v. Flower*, 8 P. Wms. 869.

In *Brown v. Knapp*, 17 Hun, 160, 79 N. Y. 196, a testator, domiciled in Connecticut, gave a legacy to his infant grandson living in New York, payable when he should attain twenty-one years of age, and appointed an executor, also living in New York. The executor passed his final account in Connecticut. Held, that the grandson could maintain a suit against the executor in New York, to recover interest on his legacy during his

minority (because the testator stood towards him *in loco parentis*), and that the rate of interest fixed by law in Connecticut should govern.

In *Price v. Brown*, 60 How. Pr. 511, a surviving executor and trustee alleged, in a suit in equity, that his co-executor had received all the funds of the estate, most of which was situated in New York, where their testator was domiciled, and where his will was proved and his executors qualified; that such co-executor had mismanaged and squandered the estate; that plaintiff is a legatee of the estate, as well as executor; that his co-executor was a resident of New Jersey at the time of his death, and that the defendant is his executor, and proved the co-executor's will in New Jersey, and also resides there. *Held*, that the defendant could be called to account for the acts of his testator (complainant's co-executor), in the courts of New York.

In *Davis v. Morris*, 76 Va. 21, a citizen of Mississippi, by will, appointed a citizen of Virginia trustee of a legacy for his daughter and her children. The daughter and her only child, after testator's death, became residents of Virginia. *Held*, that the child, after her mother's death, could maintain a suit in Virginia against the executors of the trustee, for his alleged breach of trust committed in reference to testator's estate in Mississippi, although it appeared that there was then pending in Mississippi a suit by another legatee against the same defendants, to recover another legacy, and that defendant was also a party thereto.

In *Palmer v. Phoenix Ins. Co.*, 84 N. Y. 63, an executor, residing in New York, of a testator domiciled in Connecticut, having proved the will in both States, was held capable of bringing an action in New York against a Connecticut insurance company, on a policy issued by the defendants on his testator's life.

In *Moore v. Lewis*, 21 Ala. 580, the administrator of a legatee filed a bill in Alabama to recover a legacy given to his intestate by a will proved in Cuba, and relief was denied. See *Jemison v. Smith*, 37 Ala. 185.

In *Campbell v. Wallace*, 10 Gray, 162, a *cestui que trust* claimed under a will duly probated in England, but not in Massachusetts, nor was a copy thereof filed there. *Held*, that the court had no jurisdiction, although the defendant, the trustee, seems, from the report of the case, to have been a resident of Boston.

In *Porter v. Trall*, 8 Stew. Eq. 106, a non-resident testator held a mortgage on lands in New Jersey. *Held*, that his executors could not, on merely filing an exemplified copy of the will in the county where the mortgaged premises were situated, foreclose the mortgage, their capacity being objected to by answer. But see *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Averill v. Taylor*, 5 How. Pr. 476; *Hayes v. Frey*, 54 Wis. 503; *Eells v. Holder*, 2 McCrary, 622.

In *Sneed v. Ewing*, 5 J. J. Marsh. 460, a will proved in Indiana and unrecorded in Kentucky, was held inadmissible as evidence of a devise of

lands lying in Kentucky, in a suit in the latter State. See *Bromley v. Miller*, 3 T. & C. (N. Y.) 575; *Hood v. Mathers*, 3 A. K. Marsh. 553; *Ives v. Allen*, 12 Vt. 589; *Wilson v. Tappan*, 6 Ohio, 80 (173); *Budd v. Brooke*, 8 Gill, 201; *Ward v. Hearne*, Busbee, 184.

In *Paschal v. Acklin*, 27 Tex. 178, a will was probated in Tennessee, on proof which would authorize its probate in Texas, but a certified copy of the will and of its probate was deemed inadmissible evidence of a devise of lands in Texas.

In *Scruggs v. Driver*, 81 Ala. 274, a testator residing in Tennessee gave to his wife certain bequests in lieu of her dower. She dissented, and, before her dower and distributive share of the estate had been allotted to her, the executors made a contract with her agent to purchase her interest in the estate. At the time the contract was made the widow was dead, but this fact was not known to the executors nor to her agent. On a bill filed by the executors in Alabama against her executor to cancel their contract, on the ground of mistake, *Held*, that a cross-bill to compel the plaintiffs to account for her share of the estate would not be entertained, there appearing to be no danger of loss if defendant should be remitted to Tennessee for its recovery, and it also appearing that there were no assets of the estate in Alabama. See *Coley's Estate*, 14 Abb. Pr. 461.

In *Woodruff v. Young*, 43 Mich. 548, complainant filed a bill in equity, alleging that her father had died in New York, leaving a will, which was duly probated there, whereby he gave one-third of his estate to her mother and the remaining two-thirds to herself, her brother and sister equally, and appointed her mother executrix; that her mother duly qualified and administered on the estate, in New York, and is still the executrix thereof; that afterwards complainant removed to Michigan; that the estate is not yet settled; that no accounting has been had with her, nor her share paid; and that one of the defendant's her sister's husband, is fraudulently appropriating the estate to his own use, and denies complainant's claim to any part thereof. *Held*, that the courts of Michigan had no jurisdiction over the matter.

In *Stamps v. Moore*, 2 Jones (N. C.), 80, one domiciled in Virginia made a will appointing an executor, who also resided there, and who proved the will there, and undertook its execution. By the will certain slaves in North Carolina were bequeathed to the plaintiff. *Held*, that he could not maintain detinue for them, because the executor could not "assent" to the legacy of the slaves without making probate of the will and taking out letters testamentary in North Carolina. See *Alfonso's Appeal*, 70 Pa. St. 347.

In *Hedenberg v. Hedenberg*, 46 Conn. 80, it was held that, where an executor of a testator domiciled in New York, who was himself domiciled there at the time of his testator's death, afterwards moved into the State

of Connecticut to reside, and brought with him property of his testator, he could not be held liable, in the latter State, to a creditor of his testator to the extent of the property brought there.

In *Jenkins v. Lester*, 181 Mass. 355, a trust fund was created under the will of a New York testator for the benefit of his daughter Caroline, and his wife was made trustee. She proved the will in New York and accepted the trust. Complainant, as well as Caroline and her husband, resided in Maryland, and the trustee in Massachusetts. Complainant, claiming to be a creditor of Caroline, sought relief against her and her trustee in a Massachusetts court, and to obtain payment of his debt from the trust fund. The trustee had never accounted in New York. *Held*, that the creditor could not obtain the relief sought, because Caroline herself could not have enforced the trust in Massachusetts. See also *Leland v. Smith*, 181 Mass. 358, note; *Emery v. Batchelder*, 182 Mass. 452.

In *Field v. Gibson*, 20 Hun, 274, an executrix appointed in New Jersey, who had taken possession of premises rented by plaintiff to her testator, was held not liable to be sued *at law* for the rent thereof. *Query*, whether she would have been liable *in equity* for an accounting. See *Atchison v. Lindsay*, 6 B. Mon. 86; *Patterson v. Pagan*, 18 S. C. 584.

In *Webb's Case*, 11 Hun, 124, plaintiff began an action at law against B. for breach of covenant against encumbrances in a deed made by B. to plaintiff. Pending the action, B., a resident of New Jersey, died, and letters testamentary on his will were granted to his three sons in New Jersey. *Held*, that the action could not be revived against them by service on one of them in New York.

In *Mahnken's Case*, 9 Stew. Eq. 518, four minor children, domiciled in Germany, where their mother also resided at her death, and where their guardian had been appointed, petitioned the court in this State for an order requiring their father's executors, who were residents of New Jersey, to pay to them or their guardian, the moneys due their mother from their father's estate. Their mother was alleged to have bequeathed to them all her property, but her will had not been proved here, nor any administration on her estate granted. *Held*, that, the executors objecting, they could not be ordered to pay over the money, either to the children or to their guardian, although they admitted that they held for the mother's estate the amount claimed by the children; and that they would be required to pay it only to a legal representative of the mother here.

In *Musselman's Appeal*, 101 Pa. St. 165, a testator residing in North Carolina appointed his brother, residing in Pennsylvania, his executor and trustee. The executor qualified in North Carolina in 1862, and filed an inventory, but never filed an account there. In 1874 he died, and M. was appointed administrator *de bonis non cum testamento annexo* of the testator. *Held*, that the executor and children of one of the *cestuis que trustent* could not sustain a suit in Pennsylvania to recover such sums as

should be found to be due them under the will. See *Van Dyke's Appeal*, 31 Leg. Int. 69; s. c., *Van Dyke v. Van Dyke*, 9 Stew. Eq. 521, 11 Stew. Eq. 280.

It has been held that a non-resident plaintiff could not maintain a suit in another State, against executors appointed in a third State. *Magraw v. Irwin*, 87 Pa. St. 139. But in *Slatter v. Carroll*, 2 Sandf. Ch. 578, a Maryland creditor of a testator who also lived in Maryland, was held capable of suing, in New York, the trustee who lived in New York, for the proceeds of lands lying in New York and devised to the trustee.

In *Naylor v. Moody*, 2 Blackf. 247, 8 Blackf. 91, filing, in Indiana, letters testamentary granted to plaintiffs in Kentucky, was held insufficient to authorize plaintiffs to maintain a *scire facias* to revive a judgment obtained by their testator against the defendant—the letters should have been also recorded. See *Sayre v. Helme*, 61 Pa. St. 299.

To maintain a suit in another State, an executor must allege the probate of the will in his bill. *Pelletreau v. Rathbone*, Sax. 831; *Pitts v. Melser*, 72 Ind. 469; *Kerr v. Moon*, 9 Wheat. 565; *Noonan v. Bradley*, 9 Wall. 394; see *Beckham v. Wittkowski*, 64 N. C. 464; *Berney v. Drexel*, 12 Fed. Rep. 398. And, if alleged, probate may be taken out at any time before the hearing. *Osgood v. Franklin*, 2 Johns. Ch. 1, 14 Johns. 527; *Smith v. Peckham*, 39 Wis. 414.

But where the complainant claims, as heir, that the will is void, and sets it out in his bill, the *defendant*, as executor, need not allege or produce its probate. *Tarver v. Tarver*, 9 Pet. 174.

What is a sufficient certification of domiciliary probate to authorize probate of a foreign will, or its admittance as evidence in another State. *Chrisman v. Gregory*, 4 B. Mon. 478; *Melvin v. Lyons*, 10 Sm. & Marsh. 78; *Applegate v. Smith*, 31 Mo. 166; *Townsend v. Moore*, 8 Jones (N. C.) 147; *Isham v. Gibbons*, 1 Bradf. 69; *Donegan v. Taylor*, 6 Humph. 501; *Slaughter v. Cunningham*, 24 Ala. 260; *Turner v. Linam*, 55 Ga. 258; *Lancaster v. McBride*, 5 Ired. 421; *Otto v. Doty*, 61 Iowa, 23; *Carpenter v. Denoon*, 29 Ohio St. 379; *Bradstreet v. Kinsella*, 76 Mo. 63; *Townsend v. Downer*, 32 Vt. 188.

In *Gray v. Ryle*, 18 Jones & S. (N. Y.) 198, plaintiff sued defendant, as executrix, to recover money alleged to be due him on a contract with her testator. The defendant, who had been appointed in New Jersey, did not demur, but appeared and answered on the merits. At the trial, she moved to dismiss the complaint for want of jurisdiction. *Held*, that it must be dismissed because plaintiff had not averred that defendant had brought into New York assets of the estate, and, as this concerned the power of the court, it was not waived by defendant's appearance and answer.

See, further, 9 Am. Law Reg. 577, 641; *Stirling-Maxwell v. Cartwright*, L. R. (9 Ch. Div.) 173 (11 Ch. Div.) 522, 26 Moak, 10, 14, notes.

It has been held that a guardian may sue or be sued anywhere. *Morrison's Case*, 1 H. Bl. 665; *Pedan v. Robb*, 8 Ohio, 227; *Moore v. Hood*, 9 Rich. Eq. 311; *Beeler v. Dunn*, 3 Head, 87; *Rinker v. Streit*, 33 Gratt. 668; *Hickman v. Dudley*, 2 Lea, 375; but see *Morrell v. Dickey*, 1 Johns. Ch. 158; *Curtis v. Smith*, 6 Blatch. 537; *Leonard v. Putnam*, 51 N. H. 247; *Todd v. Rhoads*, 37 Pa. St. 60; *West v. Gunther*, 3 Dem. (N. Y.) 386; *Vincent v. Starks*, 45 Wis. 458; *Trimble v. Dzieduzyiki*, 57 How. Pr. 208.

SUNDERLAND vs. HOOD.

[84 Missouri, 293.]

UNDUE INFLUENCE.—WHEN SUFFICIENT TO INVALIDATE A WILL.

The mere existence of an improper influence is not evidence of the exercise of undue influence.

APPEAL from a judgment of the St. Louis Court of Appeals.

Broadhead & Haussler and *C. V. Scott*, for appellants.

Charles L. Moss, for respondent.

HENRY, C. J. This is an action under section 3980 of the Revised Statutes, instituted by the nephews and nieces, the nearest surviving relatives of Julius P. Sunderland, deceased, to contest the validity of an instrument purporting to be, and admitted to probate as, his last will and testament. The allegations in the petition are, that at the time he executed the paper in question he had not a disposing mind and memory, and was unduly influenced to make it. There was sufficient evidence tending to prove both allegations to sustain the verdict, which was that the instrument was not the last will and testament of Julius P. Sunderland. On appeal to the St. Louis Court of Appeals, the judgment of the Circuit Court was reversed, and plaintiffs have appealed to this court.

There was evidence tending to prove that Sunderland and the defendant, to whom, by the terms of the contested will, he devised and bequeathed all his property, except a gold watch, which was bequeathed to one of his nieces, had for years lived in a state of concubinage. There was no direct evidence that, at the time the will was made, the defendant was exercising over the mind of Sunderland the influence, if any, which she had acquired through her illicit connection with him. No evidence that she said anything to him, when, or before the will was made, to procure its execution, but she was present when it was made, observing closely what transpired in the sick-room, and evidently aware of the disposition the dying man was about to make of his property. And these, with other proved facts, were sufficient to sustain the verdict finding that the influence she had acquired over Sunderland was exerted, *not merely existing*, and was "operative on the mind of the testator in the very act of making the testament." (*Eckert v. Flowery*, 43 Pa. St. 52.)

The court, for plaintiffs, however, gave the following instruction :

"The court instructs the jury that undue influence, as used in these instructions, means any influence of an improper kind, which they may believe from all the facts and circumstances admitted in the evidence, so operated upon the different faculties of the deceased, Julius P. Sunderland, as to cause him to make a different disposition of his property than he would have made if free from such influence, and that it makes no difference from what source such undue influence may have proceeded, if the exertion thereof upon him existed down to and at the time of the execution of the paper in question, then the jury should find said paper is not his will."

This instruction assumes that an improper influence, acquired by one over another, which leads and induces the latter to execute a will in favor of the former, although nothing was ever said or done by the beneficiary to procure the making of such will, is sufficient to avoid it. That if a man and woman have illicit connection with each other, and by this means either acquires an influence over the other which prompts that

other to execute a will in which the partner in guilt is the beneficiary, it cannot stand. If this is a correct enunciation of the law, then whether such devisee was present or absent when the will was made, and although the ocean may separate the testator and devisee, and no communication may have been had between them for years, this inexorable principle would invalidate the will. It is not the existence, but the exertion of that improper influence, which invalidates the will. We do not think that the case of *Dean v. Negley* (41 Pa. St. 312) gives any support to the position that "the influence of an adulteress over her paramour will, in itself, avoid his will in her favor." In the opinion of Lowrie, C. J., who delivered the opinion of the court in that case, it was said: "If, then, there was such a relation between the testator and Mrs. Bolton at the time of the making of the will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator, and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a *presumption of law* of undue influence, but we do not so decide, but leave it as a question of fact merely."

Eckert v. Flowery (*supra*), and *Monroe et al. v. Barclay et al.* (17 Ohio St. 302), are authorities against the proposition that the mere existence of an undue or improper influence, operating but not exercised by the person having it, upon the mind of the testator when he makes the will, is sufficient to invalidate it. Many wills are made which ought not to have been made. Testators are always under some improper influence when the proper objects of their bounty are in no way provided for in their wills. A father who disinherits a worthy and needy son or daughter, has the right, but must be prompted by some improper influence to do so. He may have formed an attachment for strangers stronger than that for his children, which should not exist, but the law does not prevent him from gratifying his whims or caprice in the testamentary disposition of his property.

The judgment of the Court of Appeals is affirmed. All concur.

Distinction between the Influence of a Wife and of a Mistress.—A wife may legitimately use her influence with her husband to induce him to make a will in her favor (*Lide v. Lide*, 2 Brev. 408; *Small v. Small*, 4 Greenl. 228), unless there is proof that she exerted her influence in an especial degree to secure advantages to herself to the injury of other natural objects of the testator's bounty. *O'Neill v. Farr*, 1 Rich. 80; *Thompson v. Farr*, 1 Spear, 98; *Rankin v. Rankin*, 61 Mo. 295; *Zimmerman v. Zimmerman*, 23 Penn. St. 375; *Miller v. Miller*, 3 Serg. & R. 267; *Hughes v. Hughes*, 32 N. J. Eq. 701; *Meeker v. Meeker*, 75 Ill. 260.

It has been held that a wife's influence, in order to be considered undue, must amount to coercion or fraud. *Boyse v. Rossborough*, 6 H. L. Cas. 2.

"But we should do violence to the morality of the law, and therefore to the law itself, if we should apply this rule to unlawful as well as to lawful relations; for we should thereby make them both equal in this regard at least, which is contrary to their very nature." *Dean v. Negley*, 41 Penn. St. 312, 317; *Denton v. Franklin*, 9 B. Mon. 28; *Kessinger v. Kessinger*, 37 Ind. 341.

Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former it is right because the relation is lawful, and in the latter it may be condemned because the relation is unlawful. *Dean v. Negley*, 41 Penn. St. 312, 318.

In *Kessinger v. Kessinger*, 37 Ind. 341, 348, the court said: "We are of opinion that there is a difference in the two cases, and that an influence when exercised by a wife might be lawful and legitimate, but which, if exercised by a woman occupying merely an adulterous relation to the testator, might be undue and illegitimate. This must be so from the very nature of civilized human society and the domestic relations of life." Citing 1 Redf. Wills, 581-2-3; *Dean v. Negley*, 41 Penn. St. 312; *Monroe v. Barclay*, 17 Ohio St. 302; *DeLafield v. Pariah*, 25 N. Y. 9.

In South Carolina if a testator have a wife and legitimate children, a devise or bequest to a mistress or bastard is void so far as it exceeds one fourth part of his estate after payment of debts. S. C. Gen. Stat. (1882), §§ 1866, 1785; *Stimson's Am. Stat. Law* (Jan. 1, 1886), § 2615.

And under the Louisiana Code there are restrictions upon gifts to natural children and concubines. La. Rev. Civ. Code (1875), § 1481 and §§ 1483-1488. A will in favor of a mistress is, in that State, absolutely void as against public policy. *Gibson v. Dooley*, 32 La. Ann. 959.

Although the case of *Dean v. Negley*, 41 Penn. St. 312, referred to in the leading case, is always cited in support of the position that no presumption of law of undue influence is raised from the mere existence of illicit cohabitation, nevertheless the court in that case used the following language: "If the law always suspects and inexorably condemns undue influence, and presumes it from the very nature of the transaction in the

legitimate relations of attorney, guardian and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act which is under investigation." *Dean v. Negley*, 41 Penn. St. 312, 317.

REBHAN *vs.* MUELLER.

[114 Illinois, 343.]

PROBATE OF A WILL.—REVOCATION OF LETTERS OF ADMINISTRATION.

Where a will is found and admitted to probate after a grant of letters of administration, the letters will be revoked, and, in the absence of a statutory regulation, there is no limit of time within which a will must be offered for probate, provided that it is so offered within a reasonable time after it is discovered.

APPEAL from a judgment of the Appellate Court for the Fourth District. The facts sufficiently appear in the opinion.

W. C. Kueffner and *J. M. Dill*, for appellant.

R. A. Halbert, for appellee.

CRAIG, J. Christian Mueller died March 7, 1870. On June 11, 1883 (more than thirteen years afterwards), Solomon Mueller, a son of the deceased, produced in the Probate Court of St. Clair county a paper purporting to be the last will of the deceased, which was dated March 19, 1855, and asked that it might be admitted to probate. The witnesses to the will appeared, and after hearing their evidence, the court revoked letters of administration which had been previously issued, and admitted the will to probate. No question was made in regard to the genuineness of the will or the capacity of the testator to make will, but the point presented by the record

"relates to the time within which a will must be offered for probate after the death of the testator."

Section 12, chapter 148, of the Revised Statutes of 1874, entitled "Wills," requires any person who may have in his possession the last will or testament of another, immediately upon the death of the testator, to deliver such will to the county court of the county. This section of the statute imposes a fine for withholding a will from the county court, and also a severe punishment for willfully secreting a will. But a failure of any person who had the custody of a will to observe this requirement of the statute, could not affect the rights of any person claiming under a will, nor the jurisdiction of the Probate Court to admit the will to probate upon proper proof, whenever, within a reasonable time, a will might be brought into court. Upon the death of a resident of this State, if no will is produced and probated, letters of administration may be granted upon the estate of the deceased. But section 28, chapter 3, of the Revised Statutes of 1874, declares: "If at any time after letters of administration had been granted, a will of the deceased shall be produced, and probate thereof granted according to law, such letters of administration shall be revoked." From the reading of this section of the statute, the legislature did not seem to fix upon a definite time within which a will should be presented in court and admitted to probate, and we find no section of our statute which may be regarded as a limitation law barring the probate of a will after a specified time. The legislature has seen proper to limit the time within which different causes of action may be brought in this State, but as to the probate of a will no time has been designated within which it must be done. In England no definite time is fixed within which a will should be proved. In 1 Jarman on Wills, page 218, the author, in speaking on this subject, says: "The time within which, after the testator's death, the will is to be proved, is said, in England, to be somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the will, the quality of the executors, the absence of the witnesses, the importunity of the creditors and legatees, and

other circumstances incident thereto." In *Massachusetts*, in *Shumway v. Holbrook* (1 Pick. 116), it was held that a will may be proved more than twenty years after the death of the testator, in order to establish a title to real estate. In some of the States the time has been regulated by statute, but in the absence of a statute regulating the subject, we are not aware of any precedent which would authorize a court in holding that a will could not be admitted to probate unless presented to the Probate Court within a specified time.

Within what time an action may be brought to recover a debt, or to recover the possession of lands, or within what time an action for tort may be brought, or, indeed, any action, is purely a matter to be determined by an act of the legislature. So, also, if there is anything in the policy of the State which would require the will of a deceased person to be proved and admitted to probate within seven, ten, or any other given number of years, it is a matter to be regulated by the legislature, and not by judicial determination. It is no doubt desirable, and perhaps for the best interests of an estate, where a person dies testate, that the will should be presented to the court and probated at once; but if a will is not produced, and letters of administration issue, acts done and rights accrued under such administration will be entitled to protection, so that no serious consequences can follow from the delay in probating a will.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HATCHER vs. HATCHER.

[80 Virginia, 169.]

REPUBLICATION.—EFFECT OF A CODICIL.

The execution of a codicil effects the republication of a will, so that both the will and the codicil speak from the date of the latter.

APPEAL from a decree of the Circuit Court of Bedford County. In Chancery. The opinion states the case.

Burks & Burks, for appellants.

E. P. Goggin, for appellees.

HINTON, J. The question in this case arises upon the construction of the second clause of article 6th of the will of Julius H. Hatcher, deceased, which is in the following words :

“Also, if anything should happen to the negroes named for Laura and Florella before they get fully in possession of them, I wish said loss made up to each of them, as I wish to make all my children equal in the division of my estate. I wish no difference to be made among them.”

Now, the first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. (*Smith v. Bell*, 6 Pet. 75.) But this intention must be collected from the words of the will, for the object of construction is not to ascertain the presumed or supposed, but the expressed intention of the testator, that is, the meaning which the words of the will, correctly interpreted, convey. The expressed meaning being, in wills, as in other written instruments, in legal contemplation, equivalent to the intention. (*Shore v. Wilson*, 9 Cl. & F. 525; *Wooten v. Redd*, 12 Gratt. 205.) And in order the better to comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person whose will he is called on to construe, and with the aid of such extrinsic evidence as is admissible for the purpose, possess himself of the condition of the testator and his family, and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property. (*Wooten v. Redd*, 12 Gratt. 205; *Hooe v. Hooe*, 13 Gratt. 245; *Williamson v. Coulter*, 14 Gratt. 398.) With the lights thus afforded him, he is prepared as well as it is possible for him to be, without letting in evidence of the testator's

actual intention as contradistinguished from his written meaning, to declare, upon a careful examination and comparison of all parts of the will, what is the meaning of the words which the testator has seen fit to employ. Now, here the testator was a man possessed of a fair estate, with five daughters, for all of whom he desired to provide alike. He had already given to each of the three, who were married, two slaves, and of these the daughters had been in possession for several years. In March, 1858, he gives in articles 1, 2, and 3 of an instrument in writing, which is neither signed nor attested however, to each of these three married daughters, the same slaves of which he had put them in possession; and by articles 4 and 5 of the same instrument he gives as follows:

“Article 4th. I give to my daughter Laura (now Mrs. Hatcher, and one of the appellees), and the lawful heirs of her body, Ellen and her increase and boy Ramsey, also the balance of property that may fall to her after my death in an equal division of the same.

“Article 5th. I give unto my daughter Florella (now Mrs. Noell, and one of the appellees), and the lawful heirs of her body, Charlotte and her increase and boy Jimmy, and the balance of property that may fall to her after my death in an equal division of the same.”

And then by the first clause of article 6th he directs: “Should it not be done in my lifetime, I wish given after my death to each of my daughters, Laura and Florella, a good horse, bridle, saddle, cow and calf, bed and furniture, all of good quality, say No. 1.” He had by the previous articles of the will given chattel property of the same kind to each of the married daughters. In September, 1864, he wrote upon the same paper another instrument, with the caption, “Codicil to the above Will,” and this instrument is duly executed and attested. The first and second articles of this codicil are as follows:

“Article 1st. I wish all my daughters jointly to enjoy the control and management of my property not devised at my death for their maintenance as long as the war lasts, provided they make my present residence their home. If any of them

think they can make better arrangements, they are at liberty to do so, and take the property I have already devised them. Out of the proceeds of the farm, &c., I wish Laura and Florella to be allowed money to furnish necessary apparel. I also wish, at the close of the war, the property not already devised, with the exception of the land and negroes, to be disposed of and divided equally among all my children then living, and the heirs of such as may be dead. The negroes to be hired out, with the exception of Nelly and Henry, who I wish to remain on the farm, to aid in supporting my daughters Laura and Florella while unmarried, it being my wish that they shall have the farm and two negroes above-named to support them on it while unmarried till the year 1871. That is, I wish them to have my home as theirs for a support if unmarried, and the two negroes named above, till 1871. But they are at liberty to make other arrangements if they think best while one or both remains unmarried. If either of them marry, this provision for them while unmarried ceases.

“Article 2d. After January 1st, 1871, I wish all my property of every sort and kind, not already devised, to be equally divided among all my children then living, and the lawful heirs of such as may be dead.”

The testator died within a week after the execution of this paper, and the slaves were emancipated as one of the results of the war. And the appellees, Laura and Florella, never having acquired possession of the slaves bequeathed to them, it is for the court to determine whether they are entitled to be compensated for the loss thus sustained or not.

The codicil, it is admitted, operates as a republication of the will, and the effect of the republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. (*Corr v. Porter*, 33 Gratt. 283; 1 Jar. on Wills [Bigelow's ed.], §§ 4, 114 *et seq.*; 1 Redfield on Wills, 287 *et seq.*) And in this case, as there is nothing in the language of the will to indicate a contrary intention, it must be held to speak from the death of the testator. (Code 1873, chapter 118, § 11; *Canfield v. Bostwick*, 21 Conn. 550.) But

as this is a matter of little consequence either way, I lay no stress upon it.

In this case we can have no difficulty in discovering what was the intention of the testator, for it is not left to implication, but is expressed in nearly every article of both will and codicil. He clearly intended to make them all equal in the distribution of his estate, and *his mode* of doing this was to give to each of his children, amongst various other kinds of chattel property, two slaves. He had already placed the married daughters in possession of the slaves which he designed for them, and his purpose was to put his unmarried daughters in possession of an equal number, and failing in this, to give them an equivalent in money. It may be that he did not contemplate the emancipation of the negroes as the result of the war as *one* of the means by which his purpose might be defeated, or it may be that, although he did contemplate this contingency as one of the means by which his purpose might be defeated, he yet chose, out of abundance of caution, to say what disposition he desired made of them in the event of their not being emancipated. His conduct in the premises is certainly susceptible of both constructions. For whilst the direction to hire out the negroes until the year 1871 does show that he contemplated, even at that late period of the conflict, as a probable contingency, that the Confederate cause might ultimately prove successful, it does not show, however, that he did not contemplate the downfall of the Confederacy, and the consequent abolition of slavery, as a possible contingency. But, however this may be, it is certainly clear that the testator contemplated that something might happen by which slaves might be wholly lost to his two unmarried daughters; and it is equally clear that, in that event, he intended that these children should be paid the value of the slaves. His purpose, therefore, was, in certain contingencies, to require that these children should be indemnified out of his estate to the extent of the full value of these slaves, and this was the way in which he proposed to equalize the distribution of his estate amongst his children, and it is the only way which he has marked out for that purpose. The question, therefore, is,

can this intention, under the rules of construction applicable to wills, be made to prevail? We think it can.

It is argued by the learned counsel for the appellants, with great force and ingenuity, and I was for a long while of the same opinion, that the language of the will is not "if anything should happen" before the legatees got possession whereby the slaves were lost to them, but it is "if anything should happen to the negroes;" and that this language naturally implies some accident or casualty, such as personal injury, death, or disease, by which the value of the property is either destroyed or seriously impaired. Admitting that such is the usual import of these words, we still think that it is allowable to give to them such a construction as will carry out the primary intention of the testator.

In *Key v. Key* (4 D. M. & G. 73), Sir Knight Bruce, L. J., said: "In common with all men, I must acknowledge there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible, upon a careful perusal of the instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

In *Grey v. Pearson* (6 H. L. Cas. 61), Lord St. Leonards said: "Nobody is more disposed than I am to abide by clear words, and to give to them their natural and grammatical meaning; but I never did and never can come to the conclusion that the words of a will cannot admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will. It is difficult to lay down, says he, any abstract rule upon the subject, but where I find the intention, and I find words pointing out the intention, and that if I give to the words their simple meaning according to grammar and according to their *prima facie* import, I defeat the intention—I hold that I am bound, by every rule both of law and equity, to see whether I

cannot give to them by natural construction an import which will effectuate and not defeat the intention."

And in *Abbott v. Middleton* (7 H. L. Cas. 94), the same great judge said: "But if, upon the whole frame of the will, I am satisfied of what was his general intention, I start with that general intention. It will not enable me to alter words, but, having ascertained the intention, then I have to ask whether I can or cannot so construe the words actually used as to carry out the intention."

Now here we are all clearly satisfied that the general scheme or intention of the testator was to distribute in kind certain different species of chattel property among his children, and then to divide the remainder of his estate equally amongst them. But it was also part and parcel of this scheme that if these unmarried daughters should fail to get full possession of the slaves intended for them, that they should be indemnified for any loss they might thus sustain; and being so satisfied, the words, "if anything should happen to the negroes named for Laura and Florella before they get fully in possession of them," &c., must be held to include a loss resulting from the contingency which has happened. By doing so we certainly effectuate the general intention, and do no great violence to the literal meaning of the words.

Upon the point that Laura and Florella were entitled to the proceeds of all the crops for the year 1865, we agree with the learned judge who decided this cause, that they were simply entitled to a support.

The decree of the Circuit Court of Bedford county must be affirmed.

Decree affirmed.

Republication by codicil.—There is some conflict among the authorities as to whether a codicil *proprio vigore*, independently of an expressed or implied intention, operates as a republication of a will. It has been settled, however, by a long line of decisions, that no particular words are necessary to constitute a republication. All that is necessary is that it shall appear that the testator considered the paper as his will at the time

he made the codicil, and anything that indicates a continuance of the testamentary intent with respect to the disposition of his property, will be sufficient. *Corr v. Porter*, 38 Gratt. 278, 282.

"The effect of a republication, according to all the cases, is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time." *Corr v. Porter*, 38 Gratt. 278, 282; *Payne v. Payne*, 18 Cal. 291; *Stover v. Kendall*, 1 Coldw. 557; *Mooers v. White*, 6 Johns. Ch. 360; *Rose v. Drayton*, 4 Rich. 260; *Murray v. Oliver*, 6 Ir. (N. C.) 55.

Consequently the will is governed by the law in force at the time of the execution of the codicil. *Corr v. Porter*, 38 Gratt. 278, 282.

"Even an unattested will may be set up by a codicil duly executed. *Harvey v. Chouteau*, 14 Mo. 587; *Van Courtland v. Kip*, 1 Hill, 590.

Thus it has been recently held in New Jersey that a codicil which confirms the will so far as it is consistent with it, is a republication of the will itself, "supplying all omissions and remedying all defects, if any, in the execution of the latter." *McCurdy v. Neall*, 42 N. J. Eq. 333, 336 (1887); s. c., 7 Atlan. Rep. 566; citing 1 Redfield on Wills, 288.

There need be no mechanical connection between the papers on which the codicil and the will are written. *Harvey v. Chouteau*, 14 Mo. 587; *Van Courtland v. Kip*, 1 Hill, 590.

Nor is it necessary in order to republication that the will be before the testator at the time of executing the codicil, nor that he make any formal declaration of an intention to republish. *Goodtitle v. Meredith*, 2 M. & Sel. 5.

If the codicil declares that it is to be taken as a part of the will, it constitutes a republication thereof. *Id.* *Corr v. Porter*, 38 Gratt. 278, 282.

So that where the testator refers to the will in his codicil, and sufficiently shows that he still regards it as his will, even though the codicil relates to personal estate only, it may operate as a republication as to realty and pass after-acquired lands. *Corr v. Porter*, 38 Gratt. 278, 283; citing *Hulme v. Heyagte*, 1 Mer. 285; 1 Redfield on Wills, 369-371; 3 Lomax Dig. Real Prop. 98-104.

Where a testator, free from any undue influence, executes a codicil to a will which was made under such influence, it will free the will from taint or fraud. *O'Neill v. Farr*, 1 Rich. 80.

ROBINSON vs. RANDOLPH.

[21 Florida, 629.]

CONSTRUCTION OF A WILL.—DEVISE IN FEE SIMPLE.—CREATION OF A SEPARATE EQUITABLE ESTATE.

Where the intention of a testator to give a fee or other entire interest in the land does not clearly appear from the words used in the clause of the will devising the land, resort may be had to the introductory clause to explain their meaning; and where the word *property* is so used in the former clause as to leave a doubt as to the testator's intention, and the same word is used in the latter clause, and such clause clearly shows an intention upon his part to dispose of all his estate, it will be held that the fee, or other entire interest in the land, was intended to be given, and passes to the devisee, the other parts of the will consisting with such an intention.

No particular form of words is necessary to the creation of a separate equitable estate. It may be declared in express terms, or inferred from the provisions of the settlement as to the mode of enjoying it.

No technical words are necessary to a devise of a fee simple estate in land. The word *property*, in the words of gift, or dispositive part of a will, carries the fee or other entire interest of the testator in the land, unless it is otherwise shown by the will that it was his intention to give a less estate.

A father devised eighty acres of land to his daughter. Considering the item giving it to her, and other parts of the will, it is held that he gave his entire interest in the land. The same item of the will provides as follows: "I desire it to be well improved and to have a good tenement house built upon it. This property I desire to secure to her so that neither she nor her husband can ever dispose of it. I appoint J. J. D. trustee, to support these bequests according to the tenor of the same." Subsequently to the testator's death the daughter married, and is still under coverture. *Held*, that the legal title is in the trustee and that the property is the daughter's separate, equitable estate, subject during coverture to the restraint imposed upon the power to dispose of it.

APPEAL from the Circuit Court for Orange County.

The appellants, Fanny R. Robinson and Benjamin M. Robinson, her husband, filed their bill in the court below against Mary Ellen Randolph, the widow of William M. Randolph, deceased, and the executrix of his will, James J. Daniel, trustee under said will, and against the devisees and heirs of said William M. Randolph. The bill prayed that the title of said Fanny R. Robinson, under said will, to a piece of land called

"Fanlock," and otherwise described in the bill, be declared to be "a legal estate in fee simple absolute in accordance with the intention and desire of the said William M. Randolph, deceased;" that the court declare and decree that the following clause in said will, namely, "this property I desire to secure to her so that neither she nor her husband can ever dispose of it," is a "repugnant condition" and null and void, "and to confirm to your oratrix the right to sell and convey the lands devised to her by the said will as if the said clause had never existed."

Several witnesses were examined as to the "intention," "desire," and "design" of testator in making the devise of the "Fanlock" place.

The will in question reads as follows :

"Fanlock, on Lake Conway, Orange County, Florida, 23d of July, 1875.

"This is my last will :

"I give to my God my soul, and ask him in the name of my Lord and Saviour Jesus Christ to accept it. I also ask his blessing on the following disposition of the property with which he has seen fit to intrust me :

"First. I desire the eighty acres, purchased by me from W. A. Patrick, known as ———, on Lake Conway, aforesaid, to be improved as it may be convenient to do so and planted in oranges, say one thousand, and also in some plums and guavas, and I hereby give the same and its revenues to my grandson, William Randolph Harney. He is not, however, to have possession until he is twenty-five years old. If he dies, his father shall have a life estate in it, and after his death it is to revert to my heirs.

"Second. I give the other eighty acres bought by me from said Patrick, situate on Lake Conway, aforesaid, to my daughter Fanny. The place is called Fanlock. I desire it to be well improved, and to have a good tenement house built upon it. This property I desire to secure to her so that neither she nor her husband can ever dispose of it. I appoint my friend,

J. J. Daniel, trustee, to support these bequests according to the tenor of the same.

"Third. I desire my wife to build a good house for my son. I give to my son my gun and watch.

"Fourth. I give to my friend, R. H. Brown, my fishing rod and reel.

"Fifth. I wish my wife to purchase some tokens of esteem and present them to those friends to whom she knows that I am attached. There are several of whose my dear mother and Jenny that I confide to her.

"Sixth. All the residue of my property, real, personal, and mixed, movable and immovable, I give to my beloved wife, Mary Ellen Randolph. I advise her to build her a good house on Gatlin, surround herself with comforts, plant trees, establish on the southern slope of the McRobert tract pits for pine apples, and to amuse herself with poultry. I know that she will build a church. I advise her to gather up all the money that she can by the sale of the hotel property, the saw mill, the insurance money, and invest the same by loan on first mortgage in Jacksonville, always taking the advice of a good and honest lawyer on the title and the security, and having his opinion in writing. Of course she will have to take from the sum sufficient means to effect the improvements of which I speak.

"I have one piece of advice, never go in debt, and never go security for any one, no matter whom. I advise her to make a will and give her property as it will do most good.

"The foregoing will is written, dated, and signed by me, and is a good olographic will by the laws of Louisiana.

"I make my wife, Mary E. Randolph, my executrix with seizer of my property. I advise her to consult Daniel, of Jacksonville, on her legal affairs in Florida, and my dear friends, Livingston and Brown, about my affairs in Louisiana. I advise her to consult Mr. Whitner on any plan of improvement she may contemplate making. His experience is very long.

W. M. RANDOLPH."

"The above instrument, on one sheet of paper, written on

three pages, was now here subscribed by W. M. Randolph, the testator, in the presence of each of us, and was at the same time declared to be his last will and testament, and we, at his request, sign our names hereto as attesting witnesses in the presence of the testator and in the presence of each other, on the next page of this sheet.

"Charles Wemrich, at Lake Conway, and resident of Orange county, State of Florida.

"R. F. Eppe, at Lake Conway, and a resident of Orange county, in the State of Florida.

"Selby Harney, at Lake Conway, and a resident of Orange county, in the State of Florida."

The decree in the Circuit Court, which was appealed from, is as follows: "This cause coming on this day for a final hearing upon the pleadings and proofs, it is the opinion of the court that the legal estate in and to the land given to Fanny Randolph by Wm. M. Randolph, the testator, by the second clause of his will, is vested in Mary E. Randolph, executrix of the said will, and that the said executrix is charged by said will with the duty of improving said lands, and making such disposition thereof, with the advice and direction of James J. Daniel, as will vest the use in the complainant, Fanny Randolph Robinson, during her life. It is therefore ordered, adjudged, and decreed that * * the bill be dismissed."

James D. Beggs, for appellants.

RANEY, J. The first inquiry in this cause is as to the quantity and character of the estate which Mrs. Robinson is entitled to under the last will and testament of her father, William M. Randolph, in the eighty acres of land described in the second item as Fanlock. The Circuit Judge decided that the legal estate is vested in the executrix, and that such executrix is charged by the will with the duty of improving the land and making such disposition thereof, with the advice and direction of J. J. Daniel, as will vest the use in Mrs. Robinson during her life. This decree is brought here for

review. It is contended on behalf of Mrs. Robinson that she has a legal estate in fee unincumbered by any trust.

The word heirs was not considered in England, even prior to the statute of 1 Victoria, ch. 26 (A. D. 1838), necessary to the creation by devise of an estate in fee simple in land, but other apt expressions in the will denoting an intention to create such an estate, were held sufficient. Among others, this effect was given to a devise to one *in fee simple* or to a person and *his assigns forever*. In that country an indefinite devise of land, as simply to A., without other words, in a will executed prior to the operation of the statute referred to, created only a life estate in the devisee. The same rule has been recognized in most of the States of the Union in the absence of a curative statute; yet not in all of them, the Supreme Court of Ohio holding that it did not obtain in that State, and in South Carolina the Equity Court of Appeals taking the same view (*Jenkins v. Clement*, Harper's Reports, 72), but the law judges following the old rule (*Hall v. Goodwin*, 2 N. & McC. 383), and the Legislature subsequently adopting that of the equity judges. (*Peyton v. Smith*, 4 McC. 476.) In Florida we have no statute, nor any decision of this court.

Mr. Jarman, in his treatise on wills (vol. 3, p. 22, 5 Am. ed.), speaking of the rule as generally adopted, says this rule of construction is entirely technical, as, according to popular notions, the gift of any subject simply comprehends all the interest therein; and a conviction that the rule is generally subversive of the actual intention of testators, always induced the courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. It has been long settled that when a devisee whose estate is undefined is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee on the ground that if he took an estate for life only he might be damnified by the determination of his interest before reimbursement for expenditures. The disparity in the amount charged upon the devisee to the value of the land made no difference. Where the charge, however, is upon the land so devised, and not upon

the devisee personally, the indefinite devise is not enlarged from a life estate to one in fee. Again, a fee simple he states is held to pass by an indefinite devise where it is succeeded by a gift over in the event of the first devisee dying under the age of twenty-one years; such devise over being considered to denote that the first devisee is to have the inheritance in the alternative event of his attaining the age in question, since in any other supposition the making the ulterior devise dependent on the contingency of the devisee dying under the prescribed age is very capricious, if not absurd. If the devisee over confers only an estate for life, or if the contingency is the dying of the prior devisee under any other age than majority, such prior devisee still takes a fee. (Ibid. 26, 27.)

It has, moreover, long been established that the use of the word *estate* in the words of gift, or dispositive part of the will, as my estate at A. or in A., or "my estate of Ashton," though accompanied by words of locality or other expressions referable exclusively to the *corpus* of the property, will carry the inheritance; yet it has been held that such will not be the case where it is not an operative word, or is used merely in the introductory part of the will by the testator in expressing an intention to dispose of all his worldly estate, or where it is by its reference restrained to an antecedent word of devise. (Ibid. 32 *et seq.*) The word *property* is held to be the equivalent of the word estate in giving a fee, and, like it, to pass the interest of the testator in the land. (Ibid. 43.)

In *Roe v. Shell* (16 East, 251), the will, after making bequests to several of the testator's relatives out of his stock in 4 per cent. consols, and of all his wearing apparel, devised as follows: "And after all my just debts and funeral expenses are paid, I leave all the remainder in the above stock *with my freehold property* to my sister, Margaret Stoker, and all other moneys due me;" and it was held that the sister took a fee in the real estate. Lord Ellenborough said: "There can be no doubt about his stocks, and Lord Mansfield was of the opinion that the word *effects* was synonymous to *property*, and would carry a fee." LeBlanc, J., remarked: "Property is a word large enough to carry the interest in the estate." (See *Patterson v.*

Huddart, 17 Beavan, 210; also *Nichols v. Butcher*, 18 Vesey, 193, where a devise of "all my real and personal property to my wife" passed the estate to the devisee and her heirs. (*Doe v. Roberts*, 11 A. & E. 1000.) In *Doe v. Morgan* (6 B. & C. 512) the testator was seized in fee of the premises in question, and after giving some pecuniary legacies, his will proceeded as follows: "And all my property and effects of all claims I shall have, I give to my brother, John Morgan, of Tull Glase in Cray, but my mother is at liberty to give £1,000 of my property where she pleases." It was held that the real estate passed to the brother, Lord Tenterden remarking that it had been decided in many cases that in a will the word *property* is of itself sufficient to pass real estate, unless there be *something in other parts of it to show clearly that the word was used in a more confined sense*, and it was further held that the use of the same word as to the £1,000 was not sufficient to show that it was used previously in a more confined sense. (*Randall v. Tuchin*, 7 Taunton, 410.) In *Bailis v. Gale* (2 Ves. Sen.) a devise to "my son Charles all that estate I bought of Mead, after the death of my wife," was held to pass the fee, and likewise the words, "All my land and estate in Upper Caterby in Northamptonshire," in *Barry v. Edgeworth*, 2 P. Wms. 523.

In our country we find a similar view obtaining. In *Lamberts v. Paine* (3 Cr. 97), a devise of all the estate called Marrowbone, lying in Henry County, containing by estimate 2585 acres of land, and also one other tract containing, &c., called P. F., was held to carry the fee in Marrowbone. The word estate is said, in the opinion, to be sufficiently descriptive in testamentary cases of both the subject and the interest existing in it—and though its meaning may be restricted by circumstances or expressions indicative of its being used in a limited or particular sense so as to confine it to the subject alone, yet in its general use it is understood to apply more pertinently to the interest in the subject. (See, also, *Godfrey v. Humphrey*, 18 Pick. 539.) In Maryland it is held that no technical terms, no particular form of words in a will, are necessary to create an estate in fee, but any words sufficiently showing the inten-

tion of the testator to dispose of his whole interest in the thing devised will suffice; and that when the intention of a testator does not clearly appear from the words used in a clause of his will which is to be construed, resort may be had to the introductory clause to explain their meaning; and that the words "estate," "property," "all I have," "all I am worth," "everything I die possessed of," "all and everything," used in a devise will pass the fee, such intent being manifest from all parts of the will taken together. (*Chamberlain et al. v. Owings et al.*, 30 Md. 447; *Burke v. Chamberlain*, 22 Md. 310.) In Massachusetts, when the devise was: "To A. I give and devise all my lands and tenements in W., with the privileges and appurtenances to the same belonging, containing 400 acres, be the same more or less. This estate was formerly the property of G., and I now devise it as a token of respect for the devisee, and in consideration of his services in directing the education of my two grandsons." A fee was held to pass to A., although words of inheritance were annexed to other devises in the same will. (*Leland v. Adams*, 9 Gray, 171; *Lincoln v. Lincoln*, 107 Mass. 590; *Crossman v. Field*, 119 Mass. 170.) In New Hampshire, where the devise was in these words: "I will all my landed property in Northampton to Abner Fogg," it was held that the devisee took a fee. (*Fogg v. Clarke*, 1 N. H. 163.) In the opinion in this case it is observed "the word property, in its most strict and proper sense, relates solely to the quantity of the estate in the land, and unless words restraining its signification are added, always means the whole interest. The word property in such connection is synonymous with the word estate or interest, and includes everything on the land which the testator possessed." (See, also, *Morrison v. Semple*, 6 Benny, 94; *Caldwell v. Ferguson*, 2 Yates, 250; *Rossiter v. Simmons*, 6 S. & R. 452.) In New York, in the case of *Jackson v. Howard* (17 John. 281), the words of the will were, "My property, after my debts are paid, I leave and bequeath to my beloved wife A., and wish her to educate my two daughters," * * * without any other devise or bequest, except a ring to another per-

son, and it was decided that the wife took the fee in the realty.

Confining our view to the second item of Mr. Randolph's will, we do not think the word *property* used therein can be regarded as not operative. It is a part of the devising or dispositive portion of the will. The testator had not previously completed the provision for his daughter. The case is very much like that of *Leland v. Adams (supra)*, where it is said: "We view the second sentence in this devise as it stands in the will, not as introduced incidentally, after the devising part was perfected, but as an operative part of the devise. In that sentence the devisor expressly repeats the devise of the 'estate,' which in the first sentence he devised by the words, 'lands and tenements.' Both must be taken together." We think the use of the word *property* in the fourth sentence of the second item of Mr. Randolph's will, which is to be taken or construed with the first sentence, and other sentences, shows that he was dealing with and had in his mind his property, or estate in the land, and intended to give and secure this property and estate to the daughter. There is nothing in any part of the will showing that this word was used in a more confined sense, or that he meant to give less than his whole interest in the land. In the case last cited the following language from *Randall v. Tuchin* (2 Marsh. 117) is approvingly quoted: "It is admitted very properly that the word 'estate' or 'estates' will carry a fee unless the other parts of the will restrain the effect of it. Formerly a narrower construction prevailed, and it was held that if the word 'estate' were attended by words designating the thing devised or its situation, it was to be considered as not descriptive of the interest intended to be passed, but only of the lands themselves, which were the subject of the devise. Latterly, however, a more liberal construction has been adopted; and the word estate, though it be followed by words which point at the situation, or at the particular house or land, has been held to convey a fee simple. It may be restrained, it may be shown by other parts of the will that the testator has used the word as descriptive only of the thing devised, and not of the interest intended to be conveyed;

but then it lies on the party who contends for this narrow construction to show that there are such words of restraint in the will;" and after quoting from or citing the same cases as reported in 6 Taunton, 410; *Roe v. Bacon* (4 M. & S. 366), *Uthwatt v. Bryant* (6 Taunton, 317), it is remarked: "These causes are decisive that the word 'estate,' even when used in a will as a word of reference, will carry a fee unless other parts of the will show that such was not the testator's intention."

Admitting, even, that the intention to give his whole interest in the land does not, upon the basis of the rule invoked, appear in the clause or item in question, but that the clause or item leaves the question in doubt, we are permitted, by the rule laid down in Maryland and elsewhere, to look to the introductory clause of the will. We there find the same word used in asking Divine blessing upon the "following disposition of *the property*," with which he has been intrusted. Not part of the property, but all of it. In *Chamberlain v. Owings* (*supra*), the Supreme Court of Maryland says: "When the intention of the testator does not clearly appear from the words used in the clause of a will which is to be construed, then a resort may be had to the introductory clause, if there be one, to explain their meaning, and if by it is manifested an intention upon the part of the testator to dispose of the whole of his estate, the words in the clause to be construed, which otherwise would be of doubtful meaning, and consequently not sufficient to pass the fee, shall be taken in that sense which accords with the intention expressed in the introductory clause, and will pass the inheritance and give effect to all parts of the will." In that case the clause to be construed gave to E. P. B. one half of certain personal property, and "likewise, one half of all and everything that shall fall to me (the testator) at my mother's decease," and the introductory clause was: "And as touching such worldly *estate* wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same in the manner and form following." This introductory clause was held to show an intention to dispose of the testator's whole estate, and the court say: "Having the intention of the testator clearly and plainly manifested in

the introductory clause of the will to dispose of his whole estate, the words 'all and everything' are sufficient to pass the fee" in the lands falling to the testator at his mother's decease. In *Fogg v. Clarke* (*supra*) the introductory clause of the will was as follows: "As to my real and personal estate, I do will the same to be disposed of as follows," and the court say: "But such introductory words, it has often been decided, are not sufficient to pass a fee when the words of the devise themselves import nothing beyond a mere devise of the land without expressing the nature of the estate which the devisee is to have in it, such introductory expressions are still, entitled to some consideration, and when accompanied with other expressions general or particular, corroborating the presumption that the testator intended to give a fee, may cause such words to pass a fee without any words of inheritance, although such devise unconnected with them might not be sufficient for that purpose." * * * "The words of this devise, *all my landed property in Northampton*, distinctly refer to the extent of the testator's interest in the land, and taken in connection with the introductory words of the will disclosing his intention to dispose of his whole estate, afford sufficient evidence that he intended to give a fee." In Virginia it is held that the use of the word "estate" or "property" in the introductory clause of a will is sufficient to enable a definite devise to carry a fee.

There is not wanting on the face of the will other good reasons for believing that the testator intended to give a fee to his daughter. It is to be observed that there is not used what might be called a proper word of limitation (as opposed to words which by construction are held sufficient) to create a fee in the devises either to the grandson, the daughter, or the widow, who are evidently the principal objects of his care and bounty. There is, however, no room for doubt in view of the rule of construction referred to above, by which a prior devisee is held to have a fee when an indefinite devise to him is to be succeeded by a gift over to another in the event of the former dying under a particular age, and he does not die under such age. (*Brigg v. Shaw*, 9 Allen, 516.) In *Cook v. Holmes* (11

Mass. 528), the testator devised to his "grandson, Gregory C., only child of his son, Daniel C., a certain piece of land in Watertown containing about six acres," without any words in the clause indicating the duration of the estate he intended to bestow. A preceding item of the will gave to a son, Stephen, a moiety of land in Newton, and "all the lands, houses, &c., described in his deed of gift to him * * *; the *said Stephen paying* one half the income to the widow, and certain other sums specified in the condition of said mortgage, *and also one half the legacies given in the will* to the testator's grandchildren;" and another item gave to his son Israel the other moiety of the land in N., he paying one half the legacies to the grandchildren. After observing that the whole of the will should be looked into, and there should be drawn from such parts of it as have a bearing upon the clause or devise under consideration, what was the probable intent and design of the testator as to the duration of the estate he had determined to bestow upon his grandchild, the court say: "If, in this inquiry, it should appear that in other devises contained in the will the testator manifestly intended estates in fee to the devisee without using apt words for the purpose, it would be natural to suppose that such was his intention in other parts of the will where the same ambiguity might exist. Now, in the devise to Stephen, * * * it cannot be supposed that he intended only to pass an estate for life; yet there are no words of inheritance. But the law construes this to be a devise in fee simple, because the land being burdened with the payment of one half of the income to the widow of the testator, and with the payment of the legacies, such must have been the intention of the testator. The same observation will apply to Israel C., to whom the other moiety of the land in Newton is devised, without any word of inheritance, but on condition of his paying one half the legacies; and yet he left that intention wholly unexpressed by any words made use of by him in the respective devises." In *Chamberlain v. Owings (supra)*, it was contended that inasmuch as a devise to Stephen was to him and his heirs, it followed that the testator knew what terms were required to pass the fee, and that therefore the

omission of such terms in the devise to Eleanor indicated an intention to give her but a life estate. The court did not concur in this, but held that having shown it to have been the manifest intention of the testator to dispose of his whole estate, and that he used words sufficient *in law* to pass the fee in his devise to Eleanor, the omission to use technical words of inheritance was to be attributed to the want of skill in the draftsman, and not to an intention to give her but a life estate.

Applying the reasoning above to the will before us, the conclusion to be drawn from a consideration of the devises to the grandson and widow is potent, as showing an intention of the testator to give the daughter a fee. If it be urged that a want of skill cannot be imputed to the testator in this case, it certainly cannot be said that the testator's knowledge of the effect of the rules of law invoked does not indicate that by his use of words or language invoking such rules they were relied upon by him to effectuate the intention they imply.

Moreover, it is a rule that the same word used in different parts of a will is to be taken as having been used in the same sense, unless there is something to show the contrary. (*Hawley v. Northampton*, 8 Mass. 32.) We find the word property, used in the clause in question, in the devise to the widow, and in the introductory clause, and it is perfectly clear that in the latter two instances that it means not only the subject-matter, but the interest of the testator therein, and there is no reason why a different meaning should be given, or a different purpose attributed to the testator in its use in the first instance.

Looking at the will as a whole, we think it was evidently the intention of the testator to give a fee to his daughter, assuming such was his estate in the land, and the intent of the testator is the great purpose to be effected where no rule of law is violated in doing it. (*Lines v. Darden*, 5 Fla. 51; 3 Cranch, 134; *Jackson v. Housel*, 17 John. 281; *Den v. Payne*, 5 Haywood, 103; *Morrison v. Semple*, 6 Benny, 94; *Tatum v. McClellan*, 50 Miss. 1.)

Having concluded that the quantity of interest or estate derived is a fee, the next question arises upon the effect of the provision that the property shall be so secured to the daughter

that neither she nor husband shall ever dispose of it, including that appointing Mr. Daniel trustee to support the devise.

Counsel for appellant contends that the restraint upon alienation is void. He cites 1 Redfield on Wills, 448; 2 Jarman, 528, 529; 21 Pick. 427. There is nothing in these citations inconsistent with the views we shall now submit.

It is settled that if a grant or devise to a male person of an absolute estate, legal or equitable in fee for life, be made, and there is annexed to it a condition that the grantee or devisee shall not have power to alien it at all, the condition is void, and the estate, in fee or for life as it may be, will rest absolutely in the grantee or devisee. The power of alienation being necessarily and inseparably incidental to such an estate, it is held that to deny it is an attempt to create a new estate not known to the law. There are, however, modifications of this rule which allow a restraint upon alienation for a limited stated period (2 Jarman, 533; 1 Washburne on Real Property, 80) and provide for the cessation of a life estate, with limitation over in fee to another person, upon the tenant aliening his interest. We are not, however, dealing with a devise to or provision for a man. The provision is for a daughter, and the object and intent of the testator was to provide for her. Either a proximate and probable, or a remote and possible, marriage of his daughter was in his mind. In the light of both English and American authorities, we do not think it can be longer doubted that restraints upon both alienation and anticipation, or either, to be effectual during coverture, may be annexed to the separate equitable estate of a married woman. It makes no difference that the grant or devise so restrained was made or took effect while the daughter was single. If before disposing of the estate she marry, the limitation or restraint becomes effectual upon, and it continues so throughout the duration of, such marriage; should she become discoverd, and marry again without having in the interim parted with her property, the restraint again becomes effectual for such subsequent marriage. It is true that during the period she is single the restraint is not binding, and in such unmarried state she may act as if it was not expressed or clearly implied in the

deed or will under which she takes. At one time this restraining power was denied by the English courts. (*Newton v. Reid*, 4 Simon, 141; *Massey v. Parker*, 2 M. & K. 174.) But in the later cases it has become settled, and *Newton v. Reid* and *Massey v. Parker*, so far as they question it, are not followed. It was found that the power of disposition given to a married woman over her separate equitable estate was, in view of the well-known influence of the husband, destructive of the very security intended for it. The Court of Equity, having created such estate, it was held that it could modify its creature by annexing to it the restraining feature. (*Tullett v. Armstrong*, 1 Beavan, 1, and s. c., 4 Mylne & Craig, 377; *Scarborough v. Boardman*, 1 Beavan, 34, and s. c., 4 M. & C. 377; *Clark v. Jaques*, 1 Beavan, 36; *Baggett v. Meux*, 1 Collyer, 138, s. c., 1 Phillips, 627; *Goulden v. Camm*, 1 DeG. F. & J. 146; *Peillion v. Brooking*, 25 Beavan, 218.)

The same doctrine is recognized in States of the Union. (*Fears v. Brooks*, 12 Ga. 195; *Robert v. West*, 15 Ga. 122; *Freeman v. Flood*, 16 Ga. 528; *Weeks v. Sego*, 9 Ga. 199; *Nix v. Bradley*, 6 Richardson Eq. Reps. 43; *Beaufort v. Colyer*, 6 Humphries, 486; *Perkins v. Hays*, 3 Gray, 405; *Nixon v. Rose*, 12 Grattan, 425; 2 Perry on Trusts, §§ 670, 671.)

In *Fears v. Brooks*, Nisbet, J., speaking for the court, said: "A separate estate may be made in a *feme sole* as well as in a married woman, which, upon marriage, will be good against the marital right, and this although no particular marriage be in contemplation. Upon marriage the trust will immediately attach upon the property so as to exclude the husband's title, although no further settlement be executed."

It is true that in Pennsylvania no such restraint can be sustained unless there is a marriage in immediate view when the trust is created, and that on the termination of the coverture the trust falls, and is not revived by a second marriage. That a marriage is in view need not, however, even in that State, appear by the instrument creating the trust, but the creation of the trust is evidence that the marriage was in contemplation of the donor, and when it is followed within a reasonable

time by its consummation, it concludes the proof. (*Wells v. McCall*, 64 Penn. St. 207.)

It does not appear from the record of the case before us when the daughter, Mrs. Robinson, married, but it is stated that she was a *feme sole* at the testator's death. It may be that even under the rule in Pennsylvania there is no power of alienation in Mrs. Robinson during the present coverture. We have found no authority outside of Pennsylvania so limiting the rule, and see no reason why, if the power can exist so limited, it cannot without such limitation.

As the rule allowing such restraint upon alienation is confined to separate equitable estates, the importance of the question, if not the interests involved, requires that we should consider whether the estate devised is of such character. It is a principle that the naming or appointment of a trustee by the donor is not essential to such an estate, but that equity will supply one whenever the intent of the donor to create a separate estate clearly appears. (*Harwood v. Root*, 20 Fla. 955; *Fears v. Brooks*, 12 Ga. 195.) There is no trouble here on this point, as a trustee is named by the testator. Does this trustee take the legal title to this property? Courts imply a legal estate in trustees, although no estate be given them in words, as where they are required to do something that requires a legal estate of some kind in them. (Perry on Trusts, § 313.)

If an agency or duty or power be imposed on the trustee, or if the purpose of the trust is to protect the estate, or if, in other words, it is a special or active trust, the legal title is in the trustee, and the beneficiary has only an equitable estate. (Ibid. § 305.) And wherever the words show a clear intent to create an estate for the sole and separate use of one during her married life, the same result will follow. (Ibid. § 309.) We think it clear that this will impose upon the trustee the duty of protecting the *corpus* of this estate against alienation during the coverture; that upon the daughter's marriage this trust, to say nothing more, arose.

The Chancellor, in *Nix v. Bradley* (*supra*), said: "There

are three modes of disposition by which a separate estate may be created in favor of a married woman :

“*First.* When technical words are employed, as instances where the estate is given for the sole and separate use of the wife.

“*Second.* Where the estate is not given after this form, but the marital rights are excluded by express words—for example, where an estate is given to the wife, but not to be subject to the power, control, or liabilities of the husband ; or, where the marital rights are restricted by words of a similar import.

“*Third.* When the marital rights are excluded by implications as in instances where by the instrument creating the estate the wife has power to do acts, to exercise control, and to make dispositions of the property which are inconsistent with the marital rights. It is thought that the most, if not all the cases of this description may be brought within one or the other of these classifications.”

In *Fears v. Brooks* (*supra*) the questions were: 1st. Did the will create a separate estate in the daughter? 2d. If so, does it restrain her right of alienation? Both questions were answered in the affirmative. It was held to be a separate estate because the marital rights were defeated, and further, that this was the purpose of the testator, and that such purpose being legal, it must be carried out, and that the marital right must yield. In *Mixon v. Roe* (12 Gratt. 425), the devise was to trustees for the use and benefit of a daughter and her heirs, with the following provision: “*And as it is my wish and desire to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property during the natural life of said Emily Coupland (the daughter), it is hereby wholly and solely confided to the discretion of the aforesaid trustees in what manner the said Emily shall receive and enjoy the profits arising from the hire or other disposition of the slaves aforesaid, and in the event of the death of said Emily, without any heir or heirs of her body, then and in that case I desire that all the slaves and their increase shall be given up to my son, Gustavus, or his heirs, forever.*” “Here,” says

the court, referring to the words we have italicised, "an intention is plainly indicated that neither the wife nor the husband shall have the right to sell or otherwise dispose of the property; which is inconsistent with the idea of its being given subject to his marital rights; in which case the *jus disponendi* would have been a necessary incident." Again, quoting 1 Benan, 17, it is said: "The separate estate may, and often does exist without the restriction, but the restriction has no independent existence; when found it is a modification of the separate estate and inseparable from it."

Under the Constitution and Laws of Florida, where property is devised to a single woman directly so as to give her the legal and equitable title, and she afterwards marries, it, during such married state, is her separate statutory property, and her title to the same continues separate, independent and beyond the control of her husband, and cannot be taken in execution for his debts, but it will remain in his care and management, and she is not entitled to sue her husband for the rent, hire, issues, proceeds, or profits thereof, nor shall he charge for the management and care of the property, but he and she may by joint conveyance sell and convey the same in the manner prescribed by the statute.

Can anything be clearer than the intention of testator to restrain the power of his daughter during her coverture to alienate or sell the land either by her separate act or the joint act of herself and her husband, is shown to be here? No more express or effectual language could have been used.

The sentence of the will in which the testator says: "I make my wife, Mary E. Randolph, my executrix, with seizer" (*seizin*, we interpret it) "of all my property" has, so far as the *seizin* provision is concerned, and was, we think, intended to have no other effect than to give his executrix, as such, whatever possession, and right or title, were necessary to the performance of her duties as executrix, but not as inconsistent with, nor to defeat any express and special devise and bequest. It is general, and if it keeps the possession of the land in question in the executrix, then it would also keep in her, as executrix, the possession of the gun, and the fishing rod and reel.

We are satisfied it has no such effect as to this land, and that it gives no more right or power to the executrix than she would have without such a provision being in the will.

In regard to the parol testimony which has been introduced to show the estate devised, it is only necessary to say that while a court may look beyond the face of the will, when there is an ambiguity as to the person or property to which it is applicable, we do not think that under this will, if ever, any parol proof can be used to enlarge or diminish, or alter the estate actually devised by the will. (*King v. Ackerman*, 2 Black, 417.)

The bill seeks, so far as its real purpose is concerned, to have the devise to the daughter declared to be a legal estate in fee simple, absolute, and that the restraining provision is void, and that she can make sale of the land. Neither of these positions is tenable. The bill makes no controversy with the executrix or others as to improvements, nor any with the trustee (except as to the legal title) so far as his rights, duties, or powers are concerned, except so far as they are involved in the question of alienation, and there is no proper basis for any decision upon these points not involved; so, particularly, in view of the limited range of the argument, we decide nothing as to them, nor more than what is said as to the legal title being in the trustee, and that the estate given is the entire interest of the testator in the land, and that the estate of the daughter during coverture is a separate equitable estate subject to the restraint upon the right to dispose of the land.

The prayer of the bill cannot therefore be granted, and the decree must be reversed and the bill dismissed, without prejudice as to any other question.

LEWIS'S APPEAL.

[108 Pennsylvania St., 133.]

THE WORDS "SHARE," "PART," AND "PORTION."

The words "share," "part," and "portion," as used in wills, are frequently synonymous, especially when applied to property acquired from an ancestor, but the word "portion" is the most comprehensive, and includes all the property or estate so received.

APPEAL from the Orphan's Court of Allegheny County.

J. McF. Carpenter, for appellant.

Thos. C. Lazear, for appellees.

MERCUR, J. By the original will of Edward Duff, he gave and bequeathed to his daughter, Mrs. Anna W. Lewis, ten thousand dollars in cash; also all his stock in the First National Bank of Pittsburgh, and all his stock in the Pittsburgh and Birmingham Passenger Railway Company. After making other bequests to other persons, the testator proceeds to declare "all the rest and residue of my estate, real and personal, shall be divided into three shares, which shares shall be given and distributed as follows: one of said shares to my daughter, Anna W. Lewis, which is in addition to the other bequests hereinabove given to her," and then goes on to dispose of the other two shares.

In the second codicil to his will, the testator, *inter alia*, declares "the share and portion of my estate which, by my said will, I have given to my daughter, Mrs. Anna W. Lewis, I direct shall be held by my executors in trust to invest and re-invest the same, and to pay to her during her natural life the interest and income thereof every six months, after deducting the expenses of the trust, and at and immediately after her death," remainder over to the children of his deceased son, George Duff, and their issue.

The present contention is whether the trust created by this

codicil applies to all the property previously bequeathed to Mrs. Lewis, or only to a part thereof. The appellant contends that the trust does not apply to the cash, and to the bank and railway stock, previously given to her. The correctness of this position is to be determined by a fair interpretation of the language of the codicil.

It must be conceded as a settled rule of construction that all the provisions of a will shall stand which are not inconsistent with those of the codicil. To that extent only does the latter operate as a revocation of the former. The dispositions of the former must not be disturbed any further than are absolutely necessary for the purpose of giving effect to those of the latter. (Jarman on Wills, 162.) A clear and unambiguous disposition of property in the former cannot be revoked by doubtful expressions in the latter. (Id. 168.)

A codicil in its practical effect is part of the will, all making but one testament. Hence, if there be any conflict, the latter disposition shall prevail.

The very purpose of a codicil is to alter the will or to modify its effect. In this codicil the testator so far modifies it as to change the use of "the share and portion" of his estate, which he had previously bequeathed to Mrs. Lewis. He makes no reference to the character, value, or items of the property which he had given her. The language is as broad and comprehensive as if it read "all the property" he had given her. It was all the share or portion or part of his estate which she was to receive, as distinguished from the shares and portions given to the other devisees. The main thought in the mind of the testator was to throw some safeguards around all the property which he intended to devise and bequeath for the use of Mrs. Lewis during her life; to protect her in the interest and income therefrom, and on her death to pass the *corpus* over to his grandchildren.

The several words, share, part, portion, are very frequently used as synonymous. When applied to property acquired from one's ancestor, the word "portion" is the most comprehensive that can be used. It is broad enough to include, and is intended to cover, all the property or estate thus received.

Thus, "portion" is defined in Bouv. Law Dictionary, 350, to be that part of a parent's estate, or of the estate of one standing in the place of a parent which is given to a child. The language of the codicil imposes the trust on all that portion of the testator's *estate* in which he intended Mrs. Lewis to have any interest. The word estate in a will is broad enough to carry everything, unless restrained by particular expressions. (1 Term Rep. 411; 2 Id. 656; *Turbett v. Turbett et al.* (3 Yeates, 187). The devise of a testator's "estate" includes not only the *corpus* of the property, but the whole of his interest therein. (3 Jarm. on Wills, 31.)

Mrs. Lewis was a widow, and childless. The testator did not wholly revoke the bequests which he had made to her. He merely changed the custody, and modified the use of the property.

We cannot give weight to the fact that the word "share" had previously been applied to the residuary estate. We have shown it to be synonymous with the word "portion." If this be incorrect, then the word portion was intended to refer to other property than the residuary estate. This is just as damaging to the claim of the appellant as if the words were synonymous. If the word share was intended to apply to the residuary estate only, and the words have not the same meaning, then the word portion, which had not been applied to that particular estate, was intended for other property, and if so, was necessarily designed to cover the other estate or property which had been bequeathed to her.

It is not necessary to refer to the numerous English and American authorities which hold as a canon of construction that a clear gift cannot be cut down by any subsequent words, unless they show an equally clear intention. In applying this rule it is sufficient that the subsequent words indicate the testator's intention to cut it down with reasonable certainty, and it is not necessary to institute a comparison between the two clauses as to lucidity. (1 Williams on Ex'rs, 185.) It cannot be cut down by any doubtful expressions in the codicil. The language of the latter must be such as to clearly establish the modification claimed before such effect can be given to it.

We concede these to be the settled rules of construction. Applying them to the codicil in question, we think the language therein contained clearly, intentionally, and unmistakably refers to all the property previously devised to Mrs. Lewis.

We see nothing in the fact that the executors were authorized to sell the real and personal estate of the testator, and to hold her share and portion in trust for her, as aforesaid, to change the conclusion at which we have arrived. (*Ravle's Appeal*, 10 Out. 193.) The learned judge committed no error in making the decree.

Decree affirmed and appeal dismissed at the costs of the appellant.

WHITWORTH vs. EWING.

[15 Lea, 595.]

WHEN THE LEGATEE IS ENTITLED TO INTEREST.

A testator by his will directed his executors to set apart the sum of \$20,000 in gold, and let it remain as so much unproductive capital, not even lending it on interest, and on the day that his great-granddaughter (naming her) arrived at the age of twenty-one years, to pay over to her the said sum in gold as a birthday present, the legacy not to vest in her until that day. The executor collected the requisite amount of funds, and then loaned the same on time, at the rate of ten per cent. per annum, payable in gold. *Held*, that the legatee was entitled to the interest.

APPEAL from a decree of the Chancery Court at Nashville.

Demoss & Malone, for complainant.

East & Fogg, for defendant.

COOPER, J. On October 19, 1870, Charles Bosley departed this life in Davidson county, where he had long resided, hav-

ing first made and published his last will and testament, which was duly proved and admitted to record. Only one of the executors named in the will qualified, and he was, on May 1, 1874, removed as executor and testamentary trustee by a decree of the Chancery Court at Nashville in a suit brought for that purpose by the present complainant, then Gertrude Bosley Bowling, an infant, by next friend. By the decree of removal "all the right, title, and interest" of the executor and testamentary trustee, in and to the estate of the testator, both real and personal, vested in him by the will were "divested out of him and vested in Nathaniel Baxter, Jr., as clerk and master of the Chancery Court, and his successors in office, in trust for the parties entitled thereto, but subject to the further orders of the court as to the appointment of a trustee," &c. On November 22, 1876, Baxter, having been succeeded in the office of clerk and master by Robert Ewing, tendered his resignation as receiver in the suit in which he had been appointed, which was accepted by the court, and thereupon the court appointed Robert Ewing, clerk and master of the court, receiver in the cause in the room and stead of N. Baxter, Jr., resigned. Both Baxter and Ewing administered the trusts of the will under the orders of the court, and with the approval of the next friend, who was also the grandfather of the complainant. On October 4, 1881, the complainant intermarried with J. L. Whitworth, and on July 8, 1882, the bill now before us was filed by complainant, by her husband as next friend, against Robert Ewing, for a construction of the testator's will and a settlement of the defendant's accounts.

The will made provision for the testator's widow, who has since died, and contains some specific devises and bequests not necessary to be noticed. It then proceeds as follows :

"I direct my executors to set apart the sum of \$20,000 in gold, and to preserve it as a sacred fund, letting it remain as so much unproductive capital, not even lending it on interest, and on the day that my great-granddaughter, Gertrude Bosley Bowling, arrives at the age of twenty-one years, I wish my executors to pay over the said sum of money in gold to her as a birth-day present, for her sole and separate use, not to be

liable for the debts or contracts of any husband she may ever have. This legacy is not to vest until said Gertrude reaches her majority.

“The rest and residue of my estate, real, personal, and mixed, including the reversion of the lands given to my wife, and also including the legacy of personalty bequeathed to her, should she not survive me, I give and devise to my executors hereinafter named, who are also constituted testamentary and executory trustees, or to the survivor of them, or to either one who may accept the trust, his or their heirs and assigns, in trust nevertheless for the following uses and purposes, that is to say: The estate is to be kept together to the best advantage, as near as possible in the manner heretofore pursued by myself, the interest, rents, issues, and profits of which are to be used, applied, and appropriated for the education, benefit, support, and maintenance of my great granddaughter, Gertrude Bosley Bowling, now an infant, for and during the period of her natural life, for her sole and separate use, her receipt to be a good voucher to my executors for said interest, rents, issues, and profits, and the same not to be liable for the debts or contracts of any husband she may ever have; and, upon the death of said Gertrude, leaving issue at the time of her death, said executors are required to transfer and convey the *corpus* of said estate, devised to them as aforesaid in trust, unto any child or children of said Gertrude who may be living at the time of her death, share and share alike, in fee simple forever; and if any child may have died during Gertrude's life leaving children or issue, said children or issue to represent or take the share of the parent. But should said Gertrude die without issue living at the time of her death, then the *corpus* of said estate, including any interest, rents, issues, and profits not used or appropriated for the benefit of said Gertrude, and also including said legacy of \$20,000 in gold, should the same not have vested, is to be disposed of as follows: That is to say, I give \$15,000 to Girard Brandon and his wife, or the survivor of them, of the State of Mississippi; and I also give \$15,000 to my wife should she then be living; and all the remainder of my estate, including all lapsed legacies, &c., so that I may

not die intestate as to my property, is to pass to, and vest absolutely, according to the laws of descent and distribution, in the persons, whoever they may be, who would have inherited the estate as my heirs and distributees had I then, that is at the time of Gertrude's death, died intestate, and without wife, children, or issue living at the time of my death," excluding, however, certain specified heirs and distributees, and their heirs.

It is stated in the bill, and admitted in the answer, that the sum of \$20,000 in gold has never been set apart for the complainant as required by the will, but that the moneys of the estate have been loaned at interest. And one object of the bill is to have the complainant's right to the interest received on the \$20,000 declared. The complainant was not of age at the filing of the present bill, nor, it seems, when the decree below was rendered. But it is stated in the brief of the defendant's counsel that she is now of age. Another object of the bill is to have a construction of the will as to the complainant's rights to the "interest, rents, issues, and profits" of the estate. The Chancellor was of opinion that the complainant was not entitled to the interest realized on the \$20,000, and was only entitled out of the interest, rents, issues, and profits, to an annual sum sufficient "for her education, benefit, and maintenance," the excess of rents, &c., to become a part of the *corpus* of the estate. The referee's report in favor of an affirmance of the decree on the first point, and a reversal on the second. Both parties have filed exceptions which only bring these points before us.

The Chancellor was of opinion that the complainant was not entitled to the interest on the \$20,000, because the fund had never been set apart as required by the will, and could not vest in complainant until she came of age. The fund was therefore a part of the estate, and the interest must also be treated as a part of the estate. The referees incline to the same view, but say that the point is not material if they are correct in holding that the entire interest and income go to the complainant. If she gets the entire income it is, of course, a matter of no consequence from what source any part of it

was derived. If the \$20,000 had actually been set apart in gold, as directed by the will, and the executor or trustee had subsequently used the gold and made a profit, it would seem clear that he could only be held to account therefor by the complainant if she came of age. The breach of trust would be as to a particular fund in which no other person could have an interest, in the event which had happened, except the legatee. In *Dimes v. Scott* (4 Russ. 195), where an executor, instead of realizing an asset and investing the proceeds in the three per cent. consols for the benefit of a tenant for life, allowed the asset to remain in the form of a loan by the testator at a higher rate of interest, it was held that the tenant for life was only entitled to the income of an investment in consols. But in *Stroud v. Gwyer* (28 Beav. 130), where a testamentary trustee, instead of investing the proceeds of an asset actually realized in consols, loaned the fund at a higher rate of interest, it was held that the tenant for life was entitled to the entire income. In *Stephenson v. Harrison* (3 Head, 729), a testator directed his executors to sell certain land and deposit the proceeds in a designated bank for the benefit of his slaves, who were to be emancipated after his wife's death. The widow sought to hold the executors to account for the profits made by them on the proceeds of the sale of the land. This court held that she was not entitled to an account. The opinion adds: "It was not the intention of the testator that this fund should be used by any one, but to remain in bank securely for the slaves at the death of the widow. But if any profit was made upon it by the executors, it would constitute an addition to the fund for the same purpose. It was an accumulation that must go with the fund, whether made with or without authority. The trustees can have no benefit from it themselves, nor can it be separated from the fund for the benefit of any one else." The reason of these rulings is that a fund once fixed with a trust becomes so far separated from the general assets of the estate that the trustee must account to the beneficiary for profits, "whether made with or without authority." It is not necessary that the beneficiary should have a vested interest in the fund at the time of the breach of trust. The

slaves in the Stephenson case could take nothing until emancipated, after the death of the widow. It is enough if the beneficiary subsequently acquires a vested interest under the will.

The record in this case shows that the personal assets have, with slight exceptions, all been realized. The answer of the defendant, while conceding that the gold has perhaps never been set apart as ordered, adds: "The account sought by this bill may, however, show that the executor, in attempting to partially carry out the direction of the will in this regard, lent out about the sum named, and took notes therefor payable in gold. But these notes, with other assets, upon his settlement, he turned over to N. Baxter, Jr., clerk and master, and such of these notes as were not paid by the makers to said Baxter were by him delivered to this respondent." It appears from the record in the suit brought by the complainant to remove the executor, which is necessarily referred to by the pleadings in this cause, although not copied into the record, that the course of the executor in loaning instead of setting apart the \$20,000 was taken only after consultation with the grandfather of the complainant, who became her next friend in the suit, and who not only advised the loaning of the money, but borrowed \$5,000 of it on ten years' time at ten per cent. per annum interest, securing the loan by mortgage on realty. (*Bowling v. Scales*, 2 Tenn. Ch. 63.) It fairly appears, therefore, that the money was realized to be set apart, and was then, by a breach of trust, loaned upon notes bearing interest at the rate of ten per cent. per annum, and payable in gold. The interest in such a case would follow the trust fund.

The difficulty in the residue of the will, which we are asked to construe, is in reconciling the language used in all its parts so as to work out a definite plan. There can be no doubt that an active trust is created for the management of the residue of the estate during the life of the complainant, and then there is a devise over in two different contingencies, that is to say, in the event the complainant leaves issue living, and in the event she leaves no living issue. Obviously, we would suppose that what was to go over would be the same, or substantially the same, in each contingency. But taking the words used liter-

ally, only the *corpus* of the property would go to the children, while, in the absence of issue, the testator's heirs would take, in addition, a part of the rents and profits. The Chancellor has cut the knot by treating the word "*corpus*" in the devise over to the children or issue as meaning the same as the *corpus*, "including any interest, rents, issues, and profits," &c., of the devise over to the heirs of the testator. The referees think that the general intent was to give to the complainant the entire net income, and that this intent should not be thwarted by implication.

If the devise consisted solely of the first part down to the devise over to complainant's issue, it would be difficult to raise a doubt as to the testator's meaning. He gives the residue of his estate to his executors, constituted testamentary trustees also, in trust to be kept together to the best advantage, as near as possible in the manner pursued by him, the interest, rents, issues, and profits to be appropriated for the education, benefit, support, and maintenance of his great-granddaughter, for and during the period of her natural life, for her sole and separate use, her receipt to be a good voucher to the executors for said interest, rents, issues, and profits. The language thus far plainly implies that the whole of the net income, after deducting the expenses of keeping the property together to the best advantage, and not merely a sum sufficient for the education, support, and maintenance of the legatee, should go to her. The will uses the additional word for the "benefit" of the legatee, and requires only her receipt for the payments, and not vouchers showing a proper use of the fund. The will says, moreover, that the receipt of the legatee shall be a good voucher "for said interest, rents, issues, and profits," the whole of them, and not for a part. It then provides that the "same" interest, rents, issues, and profits shall be "for her sole and separate use," and not be liable for the debts or contracts of any husband of the legatee, a provision manifestly of no avail if the payments of interest, &c., are limited to the actual expenditures for the education, support, and maintenance of the legatee. The will contemplates that the payments will exceed the wants of the ward, and provides that the excess

shall constitute a sole and separate estate. Then, as if to make the meaning too clear for doubt, the will provides that, upon the death of the legatee, the executors shall convey the "*corpus* of said estate devised to them as aforesaid in trust," not a *corpus*, including interest, rents, &c., but the *corpus* devised in trust. The whole clause, and each separate part, carry the same meaning, a gift of the income to the legatee for life, and a devise over of the *corpus* to the remaindermen.

"But," adds the will, "should said Gertrude die without issue living at the time of her death, then the *corpus* of said estate, including any interest, rents, issues, and profits, not used or appropriated for the benefit of said Gertrude, and also including said legacy of \$20,000 in gold, should the same not have vested, is to be disposed of," &c. If we construe the words, "including any interest, rents, issues, and profits not used or appropriated for the benefit of said Gertrude," as covering the whole income during the entire life of the first taker, then it is obvious that the latter clause is inconsistent with all that has gone before, and the result would be, that while the tenant for life would take the whole of the net income as against her own issue, she would not have the same right as against the remaindermen in the contingency of not leaving issue. In other words, while the executors are ordered to pay the net income of the *corpus* of the estate to the tenant for life, taking her receipt therefor as a sufficient voucher, in the one contingency, their duties would be altogether different in the other contingency, and this, too, without any direction for accumulation anywhere in the will, and without any clear declaration of a change of intent, and, in fact, without any change of intent, except what we may choose to imply from the words "including any interest, rents, issues, and profits not used and appropriated for the benefit of the said Gertrude." But these latter words are immediately succeeded by the following: "And also including said legacy of \$20,000 in gold, should the same not have vested." The testator, no doubt, intended that so much of the residuary estate as was not vested in the tenant for life, at her death without issue living, should go over, and thinking perhaps that, if she died

under age, there might be some income not vested in her, the doubtful clause was added. In fact, the entire net income during her life had become vested in her by the previous part of the devise, and the clause in question had nothing to operate on, unless, indeed, we treat it as changing the first part of the devise *in toto*. But we think the words, under the circumstances, do not clearly disclose a change of intent, and are not sufficient to work so radical a difference in the interest of the beneficiary for life. That interest was intended to be precisely the same in either contingency of the devise over, except as to property, if any, not actually vested in the beneficiary at the time of her death.

The decree of the Chancellor will be reversed, the report of the referees modified, and a decree entered in accordance with this opinion. The costs will be paid out of the income of the trust estate.

Interest upon Bequests and Legacies.—"Interest is incident to the principal demand, and is not imposed upon the executor for his neglect," the rule being based upon the theory that interest follows as an accretion to the principal legacy, and depends neither upon default nor demand. *Kent v. Dunham*, 106 Mass. 586, 590, 591. Cf. *Vandergrift's Appeal*, 80 Penn. St. 116.

In regard to the time from which interest runs upon money bequeathed by will, a distinction is drawn between specific and general pecuniary legacies. On the former, interest is due from the date at which the legatee acquires a vested right or title, although the day of payment may be postponed. *Schouler's Exrs.* § 480; *William's Exrs.* § 1424; *Sleech v. Thorington*, 2 Ves. Sen. 560; *Bristow v. Bristow, Kay*, 600; *Barrington v. Tristram*, 6 Ves. 345; *Evans v. Englehart*, 6 Gill & J. 171; *Ga. Code* (1882), § 2459.

While interest upon the latter does not begin to run until such time as the legacy itself is due, usually a year from the testator's death, unless the time be extended by the will. *Kent v. Dunham*, 106 Mass. 586, 590; *Harcourt v. Morgan*, 2 Keen 274; *Schouler's Exrs. & Adms.* 481; 2 *Redfield on Wills*, 467, 486; *William's Exrs.* 1488; *Ga. Code* (1882), § 2460. Cf. *Frey v. Frey*, 2 C. E. Gr. 71; *Halsted v. Meeker*, 8 C. E. Gr. 136; *Stimson's Am. Stat. Law*, § 2816.

And if, prior to that time, the fund out of which a general pecuniary legacy is to be paid should bear interest, the residuary legatees will be entitled to the benefit. *Pearson v. Pearson*, 1 Sch. & Lef. 10, 12, doubt-

ing *Maxwell v. Wettenhall*, 2 P. Wms. 27. Cf. *Gibson v. Bott*, 7 Ves. Jun. 97.

But if the executors, in point of fact, before the time of payment, invest the fund or a part thereof in their own names as trustees for the legatee, this is equivalent to a payment of the legacy, or of a part thereof, and the interest accruing from the fund so invested does not fall into the residuum, but is payable to the legatee. *Sullivan v. Winthrop*, 1 Sumn. 4, 18, 21; *Maxwell v. Wittenhall*, 2 P. Wms. 27; 3 *Redfield on Wills*, 467.

See also *Weld v. Putnam*, 1 Am. Prob. Rep. 202; *Howard v. Francis*, Id. 321; *Welsh v. Brown*, 2 Id. 221, and the note; *Lent v. Howard*, 3 Id. 109; *Handy v. Collins*, Id. 570; *Townsend's Appcal*, 4 Id. 432.

LIKEFIELD vs. LIKEFIELD.

[82 Kentucky, 589.]

CONSTRUCTION OF A WILL.—CONDITION PRECEDENT.—HOLOGRAPHIC WILL.

A testament in these words, "If any accident should happen to me that I die from home, my wife shall have everything I possess," &c., is a valid will, and the widow will take thereunder, even though the testator die at home.

APPEAL from a judgment of the Jefferson Court of Common Pleas sustaining the will. The opinion states the case.

Woolley & Buckner and *O. A. Wehle*, for appellants.

Elliott & Hemingray, for appellee.

HOLT, J. A paper wholly written by William A. Likefield, and worded as follows, is in question as his last will by this appeal, after having been probated as such by the Jefferson County Court, and in its judgment sustained by the Jefferson Court of Common Pleas:

LOUISVILLE, January 14, 1859.

"If any accident should happen to me that I die from home, my wife, Julia An Likefield, shall have every thing I

possess, the house and lots and the money that is due to me, and for her to hold it as her own.

“WM. A. LIKEFIELD.”

He died at home on March 28, 1881, leaving the appellee as his widow, but no children, they having previously died. The testimony shows that the decedent, about the date of the above writing, occasionally made steamboat trips upon the Ohio river as a watchman; that he and the appellee lived happily together as husband and wife for over thirty years; that he kept the paper in contest in a small tin box; that in the latter part of the year before his death, and in the presence of his wife, he examined his papers, including it, and after reading it over, replaced it in the box and directed her to take care of it.

His brother and sisters, and the children of a deceased brother, now contend that it was a *contingent* will, and never became effective, as he died at home; that the words, “*if any accident should happen to me that I die from home,*” constitute a *condition*, while upon the other hand the widow urges that they were only used to give a *reason* for making the will.

A few general observations may aid in the solution of the question. The rule is, that courts will not incline to regard a will as *conditional*, if it can be reasonably held that the maker was simply expressing his *inducement* to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be *temporary* or *contingent*, it will be upheld. In this instance if the testator, by the words he used, referred to the possibility of his accidentally dying from home as a *reason* for making the will, then it must be maintained; but if he intended by them to show that he was then making only a *temporary* or *conditional* disposition of his property, it must fail, because the event named never happened.

An unexpressed intention, however strongly we may suppose it to have existed, can not be enforced; but, upon the other hand, a will can not be allowed to fail upon slight indi-

cation that the testator intended it to be conditional. The end, however, to be assiduously sought, is the *intention* of the testator, and all rules must be subordinated to it.

A brief review of adjudged cases may also serve to bring us to a proper conclusion, although each case, involving the construction of an instrument, must necessarily depend upon the particular language used; and we have been unable to find any case exactly similar to this one.

In *Parsons v. Lanoe* (1 Ves. Sr. 190), the words, "if I die before my return from my journey to Ireland," &c., were held to constitute a contingent will, and an inoperative one, because the maker returned home.

"In case I die before I join my beloved wife," &c., shared a like fate. (*Sinclair v. Hone*, 6 Ves. Jr.)

In *Todd's Will* (2 Watts & Sergeant, 145), the testator had in view a certain journey; and the language used was, "My wish, desire, and intention now is, that if I should not return," &c.; and the will was held to be conditional.

Also in *Massie v. Griffin* (2 Met. [Ky.] 364), where the will was made while the testator was on a visit in Missouri, and he willed the notes and accounts he held on his brothers to them in case he never returned. Also "*In the Goods of Robinson*" (L. R. 2 P. & D. 171), where the words were: "In case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath," &c.

In *Maxwell v. Maxwell* (3 Met. [Ky.] 101), the words were: "If I never get back home, I leave you every thing I have in the world." In this case the testator was away from home when the will was made; he had just escaped from a steamboat disaster; the navigation was peculiarly dangerous at the time, and the necessary continuation of his journey homeward continued the danger; and it was plain from the entire instrument (a letter) that it was intended to be operative only during his absence upon *that occasion*.

In *Dougherty v. Dougherty* (4 Met. [Ky.] 25), the language was: "As I intend starting in a few days to the State of Mis-

souri, and should any thing happen that I should not return alive, my wish is," &c.

It will be noticed in all the above cases, and in others not now at hand where the will has been held to be conditional, that a *specific* contingency is named, and is either confined to a *time* certain, or a *particular event*.

In this respect they are clearly distinguishable from the case now presented. The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. No specific time or particular event is named. It refers to no particular expected calamity, and the words are *general* in their character; and this fact leads to the conclusion that the testator, who was evidently not an educated man or an adept in writing such instruments, did not intend the disposition of his estate to depend upon whether he died *at* or *away* from his home. It would have been an absurd condition; and while it is true that he had a right if he chose to impose it, yet whether it is reasonable in its character can properly be considered when it is a question whether the words were used as a mere *reason* for executing the paper, or as a condition upon which it was to become operative.

It is quite natural for a person to give some reason for making a will, and as has been well said, a "close and literal interpretation may very easily carry us wide of the intention."

Swinburne says: "Albeit the testator make his testament by reason of some great journey, yet it is not revoked by the return of the testator."

Where the words, "lest I should die before the next sun, I make," &c., were used in a will written eighteen years before the testator's death, it was upheld. (*Burton v. Collingwood*, 4 Hagg. 176.)

So "in case I should die on my travels," &c., although the testator returned home, it being shown that he recognized the paper as his will shortly before his death. (*Strauss v. Schmidt*, 3 Phill. 209.)

In re Tylden (18 Jurist, 136), the language of the will was: "If it please Almighty God to call me suddenly from this

mortal life, *and during my absence from home*, I leave," &c., and it was sustained, although the testator died at home.

So *In re Dobson* (1 Eng. Law Reports, 88), where the words were: "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," &c.

Also in *Thorne's Case* (4 Sw. & Tr.), the language being: "I request that in the event of my death, while serving in this horrid climate, or *any accident happening to me*, I bequeath," &c.

In the case of *Bradford's Adm'r v. Bradford, &c.* (81 Ky. Rep.), the language of the will was of a more conditional character than in this instance, to wit: "Being in the full possession of all my mental faculties, but in feeble health, and about to start upon a long journey, and subject to the common casualties of others, I deem it prudent to provide for the disposition of my property *in case I should not return*," and it was held that it was not contingent, and although the testator returned home and lived for several years thereafter, yet it was sustained.

It is shown in this case that the testator carefully preserved the paper in contest; that he examined it the year prior to his death; and while these facts can not constitute a statutory republication of it, yet they illustrate the intention of the maker of the instrument, as they tend to show that he believed he had disposed of his property by it, and while the word "if" is an apt one to express a condition, yet the language used is so general in its character that it shows the testator intended it as words of *inducement* to the making of the will only, and not that the disposition of his property should depend merely upon the place of his death.

Judgment affirmed.

PEYNADO vs. PEYNADO.

[82 Kentucky, 5.]

CONSTRUCTION OF A WILL.—GIFT TO CHARITABLE USES.—A
MUNICIPAL CORPORATION AS TRUSTEE.

A municipal corporation may hold property in trust under a will for charitable uses, and may be compelled to execute such a trust.

APPEAL from a judgment of the Louisville Chancery Court sustaining the will. The facts appear in the opinion.

Barrett & Brown, for appellants.

Rosel Weissinger, for appellee.

HARGIS, C. J. By his will, after making various bequests, Edward Peynado devised the residuary of his estate to his wife, Ida B. Peynado, during her life, and then made the following provisions :

“ 15. One year after her death the whole of my residuary estate shall be converted into cash, and together with all accrued interest, shall be invested as follows :

“ 16. Half of the money left by me after my wife's death to be used in erecting a building in the suburbs of the city of Malaga (Spain), *to be under the patronage and care of the city authorities*, and under the superintendence of one or more Sisters of Charity, to be used as an orphan asylum and school for as many little poor orphan children (males) from respectable families as can possibly be taken. The Sisters in charge of said establishment should be well educated and well versed in geography, mathematics, grammar, history, and penmanship, so as to be able to teach the children to become learned and industrious. I have no doubt the institution will be assisted and encouraged by the good and wealthy citizens of Malaga, and will some day become a great institution. The other half of my capital or residue to be placed out on good security so as to yield a semi-annual income, and shall be

applied in paying the expenses incurred in keeping up said boarding establishment. I also leave our pictures, two oil paintings of my wife and myself, to the said institution.

"17. A true copy of this will will be sent to the then acting Spanish Minister of Spain, at Washington, D. C., by my executors, with the *request* that he should see that *an honest man be appointed* to superintend and fulfill my wish; a man who, without any reward for his services, and only for the sake of doing good to my native city, will take willingly the responsibility and trouble necessary for such a task. The person *so appointed* will have to give security, and also hand a semi-annual statement of the condition of the institution to *the then acting civil authorities of Malaga*. As the children of the institution become of age, I mean able enough to make a living for themselves, the friends of the institution will be kind enough to procure for them situations in commercial houses, stores, and factories, where they can earn an honest livelihood. This institution shall not, at any time, incur or owe a debt exceeding (\$5,000) five thousand dollars.

"18. My executors will demand security from the Spanish Minister, or his representatives, that my will shall be carried out according to my wish, and they shall keep in trust, if they think proper, the whole of my residuary estate for three years after my death, or until they are convinced of the fulfillment of my wish by the Spanish Minister *and authorities of Malaga*.

"19. If within three years after my death this bequest fail of execution from any cause, then the same shall lapse and be void, and the whole of my residuary estate, together with all accrued interest, shall be divided amongst the children of Francisco de P. Parra, Sr., Juan Jose Parra, Augustin Parra, Joaquin Parra, and Diego Parra, of New Orleans, La., and children of Jose Ma Parra and Jose Ma Vega, of Malaga, Spain."

The will was probated, and the widow renounced its provisions in her behalf. This action was brought to obtain a judicial construction of the above clauses of the will, the ultimate residuary devisees named in the 19th clause, the City of

Malaga, and the acting Spanish Minister being made defendants.

The City of Malaga and the Spanish Minister, by their attorney *in fact*, answered, separately, claiming that the will created a trust with sufficient certainty for the purpose of erecting an orphan asylum in the City of Malaga; that the city was designated as the trustee, and is capable, being an incorporated municipality, of accepting the trust, and, the widow having renounced the provisions of the will, entitled to the residuum and ready to proceed, at once, to the performance of the duties prescribed by the will and according to its terms.

The ultimate residuary devisees asserted claim to the residuum of the estate on the grounds—

1. That the trust is too vague to be upheld, and there is no discretion vested in any one to cure the uncertainty.

2. That the will requires the Spanish Minister to give security as a condition precedent to the existence or execution of the trust.

3. And if no security were required by the will, the court ought to exact it for their protection, and to retain effective control of the property represented by the surety in the event of non-execution of the trust within three years after the testator's death.

Each of these propositions was rejected by the learned chancellor in his construction of the trust clauses of the will, and a judgment rendered by him in contraposition to all of them, and the proper interlocutory orders entered to carry out the charitable intention of the testator. To test the legal virtue of that judgment, this appeal was taken by the ultimate residuary devisees.

Their position has for its basis two propositions—

1. That there is no room for equity to interfere where there is no ambiguity in the testator's declaration.

2. That there is no ambiguity in this will, but simply a non-use of such terms as are essential to the creation of a trust.

It is not necessary to the results of this opinion that the

first proposition, were it law in an unlimited extent and suitable to all states of fact, which we are inclined to doubt, should be combated, it is only indispensable that the assumptions of the second should be overthrown.

There is no ambiguity of intention in this will. More appropriate language might have been used in the creation of such an important and worthy trust, but when the language, whatever may be its purity or defects, expresses the intention of the testator in making a lawful disposition of his property, that intention will be the pole star to guide the court in interpreting the meaning of his words and construing the composition of his testament.

Where there is no ambiguity of intention ascertained by all of the language of the will, there can be no legal ambiguity attached to the will from particular expressions, defective description of property, and constrained mandatory provisions, for they may be controlled, supplied, or broadened by the context and general purpose of the will. Applying these simple, cardinal rules to this will, it becomes clear that there is no uncertainty as to the trust, and no need of discretion upon the part of any one to render it effectual. The testator did not intend that his estate should be converted into cash for investment as directed in the 16th clause, until one year after his wife's death. This purpose was based upon her anticipated acceptance of the provisions of the will, the object being to allow her the uninterrupted use during life of the property which he dedicated to the erection and support of the charitable institution, plainly described and specifically located by the 16th and 17th clauses. The reason for postponing the conversion of the residuary of his estate, having ceased by the renunciation of the widow, that limitation ceased with it, and, according to *Wood v. Wood* (1 Met. 512), and *Curling v. Curling* (8 Dana, 38), her act precipitated the conversion of the residuary after deducting her dowerable and distributable portion. Hence there is no obstruction to the immediate performance of the trust duties prescribed by the testator. He says substantially, in the 16th clause, that half of the residuary of his estate shall be used to erect a building

in the suburbs of the city of Malaga, Spain, to be used as an orphan asylum and school for male orphan children, and the remaining half of the residuary shall be loaned on good security, with interest payable semi-annually, to be applied to the current expenses of the institution, which he denominates "a boarding establishment." Language could hardly make the object of the trust more definite.

The institution, he directs, shall be under "*the patronage and care of the city authorities*," of Malaga; that a male superintendent of the institution be appointed by the city authorities, to whom he is required to give security for his conduct under his appointment, and also make a semi-annual statement of the condition of the institution. Thus we see that the city of Malaga, in its official capacity, is the trustee of the charity. It is its duty to look to it that the institution shall be conducted under the superintendence of Sisters of Charity, as teachers of the children. There is no want of a trustee to execute this charity; the city is the trustee, and it is capable of performing the duties of that station. A municipal corporation may hold property in trust for charitable uses, and be compelled to execute such trust. (29 Mo. 592, Story's Eq., § 1191; Perry on Trusts, § 43, and authorities there cited.) And we are not aware of any law where a charity is definite, its objects specific, its creation legal, and the trustee capable, that renders such a trust void for uncertainty. The doctrine of *cy pres* construction is wholly unnecessary to the determination of this case, for the reason that the object of the trust is not forbidden by any law, and the intention of the testator is plain from his own words. The authorities in and out of this State clearly sustain the conclusions indicated. In the case of *Moore's Heirs v. Moore's Devisees* (4 Dana, 354), a devise for the education of poor orphans, to be selected by the County Court, was upheld. In *Curling's Adm'r v. Curling's Heirs* (8 Dana. 38) the court sustained a devise for a public seminary, and appropriated the fund to a seminary then existing in the county.

These cases are founded upon devises not so clearly expressed as the one before us, and they are in accord with the

doctrine of Story, and the succeeding cases of *Chambers v. Baptist Education Society* (1 B. M. 215); *Attorney-General v. Wallace's Devisees* (7 B. M. 611). The charity intended by the testator is sufficiently provided for in his will by the law and public policy of this State, and, according to the rules of comity, it can not be defeated, because it is for the benefit of foreign orphans, and to be administered according to Spanish jurisprudence, which we will presume, in the absence of anything to the contrary, is consistent with the dictates of humanity and the fundamental laws of an enlightened civilization.

Perry on Trusts says, in § 741: "Bequests to be paid over to trustees in a foreign country for the establishment in such country of a *charitable institution*, will be paid over to such trustees, by order of court, to be administered by them under the jurisdiction of the courts of their own country."

This text is supported by numerous authorities, and substantially stated by Story in § 1186 of his *Equity Jurisprudence*, and until the principle it contains is restricted by inimical legislation, we feel bound to maintain it.

It is true the testator, in the 17th clause, *requests* the Spanish Minister to see that an honest man be appointed to superintend and fulfill his wish, but he is not empowered with authority to make the appointment. This request does not confer any power upon the Minister, nor is it an enforceable exaction of duty from him. He may or may not busy himself with the authorities of the city of Malaga in seeing that an honest man is appointed, but this will not render the charity void or necessarily prevent or endanger the fulfillment of the testator's wish. It is a request he had the privilege of making, and the Spanish Minister the lawful right to respect or decline as he may choose. The 18th clause, by which the executors are required to demand security of the Spanish Minister, contemplated that the funds might be paid to him for translation to Malaga, and if his executors saw proper to entrust him with them, they were required to exact of him security, and if the executors did not wish to do that, they were authorized to keep the funds in trust for three years after the testator's death, or until they were convinced of the fulfillment of his

wish by the Spanish Minister and the *authorities* of Malaga. The Spanish Minister is not asking to handle the funds. He yields that to the city of Malaga, and it has appointed its attorney, in fact, to receive and carry the funds to it. The authorities of Malaga have shown that they are willing to undertake the trust in good faith for the purpose of fulfilling the testator's wishes: hence there is no necessity for the executors keeping the funds in trust for three years. The only security required in the will is of the Spanish Minister, in the event suggested, and as he is not to use or handle the funds, and the city comes in fact and asks the control of them by its own agents, we can see no reason for demanding surety of the city or the Spanish Minister. The testator did not intend to interpose obstacles to the execution of his bequest, so that three years might expire in a vain effort to remove them, and the bequest lapse in the meantime. Such would be the result if surety were required of the Spanish Minister, and he should refuse, or be unable to give it. The result would be the same if the court were to require security for the preservation of the property to the use of the appellants, and the authorities of the city of Malaga should decline to comply with the requisition. It is for the courts of Spain to see that the trust fund is preserved and the trust properly administered when lawfully applied to for such purposes.

Wherefore the judgment is affirmed.

BRIGGS vs. BRIGGS.

[69 Iowa, 617.]

AFTER-ACQUIRED REAL ESTATE.

Section 2823 of the Code, which provides that "property to be subsequently acquired may be devised, when the intention is clear and explicit," has the effect only to extend to real property the rule which before existed at common law in regard to personalty; and the meaning of the section is, that subse-

quently-acquired property shall be held to pass by the bequest, whenever the intention of the testator to have it so pass is fairly to be inferred from the provisions of the will, when constructed according to the established rules for the construction of such instruments. Accordingly, where the testator devised the remainder of his personal property and the whole of his real estate to plaintiffs, *held*, that it carried to plaintiffs real estate, the title of which the testator acquired after the execution of the will in question.

APPEAL from a judgment of the Mitchell Circuit Court.
The facts appear in the opinion.

Cyrus Foreman and Ogden H. Fethers, for appellants.

F. F. Coffin, for appellees.

REED, J. Daniel M. Briggs acquired the real estate in question after the execution of his will, and the question which arises in the case is whether it passed to plaintiffs under the bequest set out in the foregoing statement. Under the common law, a testator had no power to bequeath subsequently-acquired real estate—seizure at the time of executing the will being requisite to enable him to convey. This rule has been abrogated by statute in this and many of the other States of this country in which the common law prevails, and in England. Our statute on the subject is § 2323 of the Code, and is as follows: "Property to be subsequently acquired may be devised when the intention is clear and explicit." It is to be observed that the rule established by this provision relates to the disposition of property of every description, and not to real estate alone. In this respect the statute differs from those of most of the other States by which the common-law rule above referred to was abrogated. The word "property," when used in the statutes of this State without qualification or limitation, includes both real and personal property. (Code, § 45, subd. 10.) Under the common law, however, the testator could bequeath personal property to be subsequently acquired. The statute creates no new power with reference to the disposal of that class of property, but simply re-enacts what has always been the law on that subject, and what would have continued to be the law without any enactment on the sub-

ject. The manifest intention of the legislature was to confer upon the testator the same power with reference to the disposal of both classes of property which had formerly existed with reference to the disposal of personal property. The same rules of construction should therefore be now applied in determining whether subsequently-acquired real estate passes by devise, which, before the enactment of the statute, were applied in determining the same question with reference to personal property, unless the words, "when the intention is clear and explicit," as contained in the statute, modify or change them. We are of the opinion, however, that no new rule of construction is created by this provision. The meaning of the section is, we think, that subsequently-acquired property shall be held to pass by the bequest, whenever the intent of the testator to have it so pass is fairly to be inferred from the provision of the will, when construed according to the established rules for the construction of such instruments; and it is not necessary that the intention be expressed in direct language. The Supreme Court of Massachusetts, in *Winchester v. Forster* (3 Cush. 366), placed this construction on a statute of that State which contains substantially the same language as the section in question.

We come, then, to the question whether the devise in this case passes the real estate acquired by the testate after the execution of his will. The bequest was of the "remainder of my personal property, and the whole of my real estate." By other provisions of the will specific devises were made to other of the children of the testator. By the provision in question, it is manifest that the testator intended to bestow the residuum of his estate, after the payment of the specific bequests, upon the plaintiffs. Bequests in this form, of the residue of the estate, have always been held to carry the residuum of all the personal property owned by the testator at the time of his death. As to that class of property, the rule is that the will speaks from the time of the death, and not from the date of its execution. (1 Redf. Wills, § 30; *Canfield v. Bostwick*, 21 Conn. 550; *Gold v. Judson*, Id. 615.)

The reason of this rule was found in the very nature of the

testamentary act. By that act the testator makes a disposition of his property which is to take effect at his death. His language necessarily relates to that time, and he speaks in anticipation of that event. When he declares it to be his will that the residuum of his estate shall pass to a named legatee, the only reasonable inference from his language is that he intends that the person named shall take the residue of all the property of which he shall be possessed at the time of his death. It was not the intention of the legislature in enacting the statute in question to change the rule; but it was enacted for the purpose of extending the operation of the rule, and making it applicable to real as well as personal property. Substantially the same construction has been placed upon similar statutes in Ohio and Massachusetts. (See *James v. Pruden*, 14 Ohio St. 251; *Cushing v. Aylwin*, 12 Metc. 169; *Blaney v. Blaney*, 1 Cush. 107.) Those statutes do not, by express provision, enact that a general devise of real estate shall be held to speak from the death of the testator, as is contended by counsel for appellant. The language which has been considered by the courts in settling the rule in those States is not broader than that contained in our statute, and the rule adopted is based upon a construction of that language.

The judgment of the Circuit Court is in accord with this view, and it will be affirmed.

What words in a will are sufficient to indicate an intention to devise after-acquired realty.—At common law, real estate acquired after the making of a will could not be devised thereby, although the contrary was the rule in regard to personalty. This distinction was explained by subtle reasoning, and gave rise to a mass of legal learning now happily useless, and interesting only as a matter of curious history. For in England and in the States of the American Union, with the exception, perhaps, of Florida (1 Bigelow's *Jarman*, 350, note, citing Fla. Bush's Dig., 1872, c. 4, p. 75), various statutes have been enacted, the general effect of which, taken together with the decisions under them, is that all the realty and personalty to which the testator is entitled at the time of his death shall pass by the will, unless a contrary intention shall appear on its face.

Ala. Code, 1876, tit. 4, c. 2, p. 586; Cal. Code, 1876, vol. 1, tit. 6, c. 1, p. 724; Col. Gen. L. 1874, c. 103, p. 929; Con. Gen. Stat. 1775, c. 11, p. 369; Dak. Rev. Code, 1877, tit. 5, c. 1, p. 348; Del. Rev. Code, 1874, c. 84, p. 513; Ga. Code, 1873, tit. 6, c. 2, p. 425; Gibbon v. Gibbon, 40 Ga. 562; Jones v. Shewmaker, 35 Ga. 151; Ill. Rev. Stat. 1880, c. 148, p. 1108; Ind. Stat. 1876, vol. 2, c. 3, p. 571; Iowa Rev. Code, 1880, vol. 1, tit. 16, c. 2, p. 607; Kans. Comp. L. 1879, c. 117, p. 1007; Ky. Gen. Stat. 1873, c. 113, p. 832; Walton v. Walton, 7 J. J. Marsh. 58; Me. Rev. Stat. 1871, c. 74, p. 564; Smith v. Hutchinson, 63 Me. 83; Meserve v. Meserve, 63 Me. 518; Md. Rev. Code, 1878, art. 49, p. 421; Carroll v. Carroll, 16 How. 275; Johns v. Hodges, 33 Md. 515; Mass. Gen. Stat. 1860, c. 92, p. 476; Hosea v. Jacobs, 98 Mass. 65; Hill v. Bacon, 106 Mass. 578; Brimmer v. Sophier, 1 Cush. 118; Blaney v. Blaney, 1 Cush. 107; Bringham v. Winchester, 1 Met. 390; Wait v. Belding, 24 Pick. 136; Winchester v. Forster, 3 Cush. 366; Mich. Comp. L. 1871, vol. 2, c. 154, p. 1872; Minn. Stat. 1878, c. 47, p. 567; Miss. Rev. Code, 1871, c. 54, p. 525; Mo. Rev. Stat. 1879, vol. 1, c. 71, p. 679; Leggatt v. Hart, 23 Mo. 127; Applegate v. Smith, 31 Mo. 166; Neb. Gen. Stat. 1873, c. 17, p. 300; Nev. Comp. L. 1873, vol. 1, c. 37, p. 202; N. H. Gen. L. 1878, c. 193, p. 455; Lovern v. Lamprey, 2 Fos. 484; N. J. Revision, 1877, vol. 2, p. 1248; Fluke v. Fluke, 1 C. E. Gr. 478; Van Wagenen v. Brown, 2 Dutch. 196; Garrison v. Garrison, 5 Id. 153; cf. Smith v. Curtis, 5 Id. 845, 858; N. Y. Rev. Stat. 1875, vol. 3, c. 6, p. 58; N. C. Revisal of 1873, c. 119, p. 847; Battle v. Speight, 9 Ired. 288; Ohio Rev. Stat. 1880, vol. 2, c. 1, p. 1486; Smith v. Jones, 4 Ohio St. 116; Board of Education v. Ladd, 26 Ohio St. 210; cf. Thompson v. Hoop, 6 Ohio St. 480; Penn. B.-P. Dig. 1872, vol. 2, p. 1476; Clarke's Estate, 82 Penn. St. 528; Cresson's Appeal, 76 Penn. St. 19; Gable v. Daub, 40 Penn. St. 217; R. I. Gen. Stat. 1872, c. 171, p. 373; S. C. Rev. Stat. 1873, c. 85, 440; cf. Cogdell v. Cogdell, 8 Dess. 346; Tenn. Stat. 1871, vol. 2, c. 1, p. 999; McGavock v. Pugsley, 12 Heisk. 689; Tex. Rev. Stat. 1879, tit. 99, p. 712; Henderson v. Ryan, 27 Tex. 673; Utah Comp. L. 1876, c. 2, p. 271; Vt. Gen. Stat. 1862, c. 49, p. 377; Va. Code, 1873, c. 118, p. 911; Smith v. Edrington, 8 Cranch, 66; Allen v. Harrison, 3 Call, 251; Hyer v. Shobe, 2 Munf. 200; Thorndike v. Reynolds, 22 Gratt. 21; W. Va. Rev. Stat. 1878, c. 201, p. 1170; Wis. Rev. Stat. 1878, c. 103, p. 649.

The statute of 1 Victoria, c. 26, § 24, enacts that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

The effect of this statute, and of those of the American statutes which follow its phraseology, is to raise the presumption of an intention to pass the after-acquired estate unless the contrary be shown (1 Bigelow's Jar-

man, 350, note), throwing the burden of proving the contrary upon the heirs.

The wording, however, of some of the American statutes would seem to throw the burden of proving the intent to pass after-acquired realty upon the devisees. Thus, the Iowa statute, referred to above, enacts (Code, § 2323): "Property to be subsequently acquired may be devised when the intention is clear and explicit."

And the Massachusetts statute provides that "any estate, right, or interest in lands acquired by the testator, after the making of his will, shall pass thereby in like manner as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator." Gen. Stat. c. 92, § 4.

So, too, in Ohio, "if such shall clearly and manifestly appear," &c. *James v. Pruden*, 14 Ohio St. 251, 253, *infra*.

So, too, in other States. But the words "clearly" and "manifestly" &c., have been very liberally construed, and the rule to be gathered from the cases is, that if the testator in *any terms* indicate on the face of his will an intention to dispose of his *whole estate*, it shall be construed to pass real estate acquired after the making of the will—all that he was entitled to devise at the time of his death. This is almost the exact wording of the statute in New York, which is very clearly expressed: "Every will that shall be made by a testator in express terms of all his real estate, or in any terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." N. Y. Rev. Stat. p. 58, § 7.

In *Winchester v. Forster*, 3 Cush. 366, 370, cited in the text, the words of the Massachusetts statute, "if it shall clearly and manifestly appear," were commented upon. The court quoting from *Brimmer v. Sohier*, 1 Cush. 138, said: "It is not supposed that these intensives can have any well-defined or precise effect in the construction of wills; they are too vague and indeterminate to form a rule of much practical use."

The object of the statute being to abolish the common-law rule by which after-acquired realty could not be devised, "and to give effect to the intention of the testator, all that can be required is, that, taking the whole will, and considering it with reference to the established rules of exposition, such an intent is shown; if so, the intent is manifest and clear."

This intent may be shown where it appears from the whole scheme and tenor of the will that he intended to make a full and entire disposition of his whole property, real and personal.

In *Cushing v. Aylwin*, 12 Metc. 169, 175, it was said: "We think it generally true that when a will purports to dispose of the testator's whole estate or property, the intention is to dispose of all the estate or property of which the testator may be the owner at the time of his death, and that

such an intent would be inferred unless something in the will should be opposed to such inference."

This is an exact inversion of the statute.

In *Canfield v. Bostwick*, 21 Conn. 550, 553, 554, referred to above, it was said: "A will speaks from the death of the testator and not from its date, unless its language, by fair construction, indicates the contrary intention."

In *Gold v. Judson*, 21 Conn. 616, it was held that wherever a testator refers to an actually existing state of things, his language should be held as referring to the date of the will. Such is the construction of the word *now*. So words in the present tense as, "all the property I am possessed of at this date."

Citing *Crosby v. Close*, Amb. 397; *Abney v. Miller*, 2 Atk. 593; *Blundell v. Dunn*, 1 Madd. 433; *College v. Coddington*, 1 P. Wms. 597.

But that if the language is general, not specific and not limited, the will speaks from the testator's death, and, of course, disposes of whatever property he had at that time.

The same liberal construction is placed upon a similar statute in Ohio.


In *James v. Pruden*, 14 Ohio St. 251, 253, in construing the words, "if such shall clearly and manifestly appear by the will to have been the intention of the testator," the court remarked that it very seldom happens that a man who goes to the trouble of making a will intends to die intestate as to any of the property that he may own at the time of his death; and held that these words of the statute were to be liberally construed, on the authority of *Lessee of Smith v. Jones*, 4 Ohio St. 121.

KIMBRO vs. JOHNSTON.

[15 Lea, 78.]

LEGATEES TO TAKE PER CAPITA.

Under a bequest to certain children and grandchildren equally, the legatees take *per capita* when there is nothing in the will to indicate a different intention on the part of the testator.



APPEAL from a decree of the Chancery Court at Memphis.

Malone & Watson, for complainants.

Johnston & Ford, for defendants.

COOPER, J. On December 11, 1882, Appless Ford died in Shelby county, testate, and the defendant, Johnston, qualified as administrator of her estate with the will annexed. She left surviving as her heirs and distributees three daughters, A. E. Ford, Sallie Taylor, and A. F. McMullen, four granddaughters and one grandson, the children of Mary F. Rains, a deceased daughter, three grandsons and three granddaughters, the children of James N. Ford, a deceased son. The will of the testatrix is in the following words: "I make and publish this my last will and testament, hereby revoking all others made by me. I desire that my notes, consisting of \$8,500, be divided equally between A. E. Ford, Sallie Taylor, Eleanor Malloy, Mary's daughters, James' daughters; my personal property be divided between Ada Rains and A. E. Ford." The bill is filed to obtain a construction of the first clause of the will disposing of the notes, there being no contest as to the second clause. And the question is whether the proceeds of the notes are to be divided between the legatees *per stirpes* or *per capita*.

Eleanor Malloy, one of the legatees named, is the complainant, the wife of A. Kimbro, and is one of the two children, the other child being a boy, of A. F. McMullen, a living daughter of the testatrix. It is conceded that the legatees described as Mary's daughters in the bequest are the children of Mary F. Rains, the deceased daughter of the testatrix, who also left one son; and that James' daughters are the children of James N. Ford, the deceased son of the testatrix, who also left three sons.

It is conceded by the learned counsel of the complainants that, by the English authorities, the legatees under the present bequest would take *per capita*, each of the daughters of Mary and James receiving an equal share with the other named

legatees. But the counsel thinks that the weight of American authority is otherwise. In this State, however, we have invariably followed the English rule of construction in the absence of anything to show a different intent. (*Ingram v. Smith*, 1 Head, 412; *Malone v. Majors*, 8 Hum. 577; *Seay v. Winston*, 7 Hum. 472; *Puryear v. Edmondson*, 4 Heisk. 43; *Parrish v. Groomes*, 1 Tenn. Ch. 581; *Rogers v. Rogers*, 2 Head, 660; *Beasley v. Jenkins*, 2 Head, 191; *Rodgers v. Rodgers*, 6 Heisk. 489.) The will before us shows a selection by the testatrix of the objects of her bounty out of persons standing in the same relation to her with others of the same *stirpes*. There is nothing, either in the will or the circumstances, to take the case out of the general rule.

The Chancellor's decree will be affirmed. The appellants will pay the costs of this court. The costs below will be paid as directed by the Chancellor.

ALSUP vs. CLARKE.

[15 Lea, 71.]

BEQUEST FOR THE "COMFORTABLE SUPPORT" OF RELATIVES.

Where a testator charges certain property given to his children with a "comfortable support" for two of his sisters "equal to what they now have," a trust is created in favor of the sisters for a fixed support, such as they were receiving from the testator at the date of the will, without reference to the performance of any services by them.

APPEAL from a decree of the Chancery Court at Memphis.

Metcalf & Walker and *W. P. Wilson*, for complainant.

Harris & Turley, for defendants.

COOPER, J. The question raised by this record is, whether the defendants, Margaret E. Clarke and Jane B. Hill, are entitled to any, and what provision under the will of their brother, J. S. Honck, who died in 1879. The first two items of the will direct the payment of debts, and make provision for the testator's widow. Then follows:

"Item 3. All the rest and residue of my estate, real and personal, of every kind and wherever situated, I give, devise, and bequeath to my children, living at the time of my death, or born thereafter, to be divided equally among them, absolutely and in fee. But this provision in behalf of my children is subject to the following charge: I have two widowed sisters, now living in Tunica county, Mississippi, viz.: Mrs. Margaret E. Clarke and Mrs. Jane B. Hill. It is my will that so long as my said sisters, or either of them, shall live, or shall have need of this aid, they and the survivor of them shall receive a comfortable support out of my estate, equal to what they now have; and the interests of my children taken under this will, whether in the hands of my executor or of the guardian of the children, are to contribute equally to furnish this support, and being charged thus, this provision for my said sisters is not to interfere with or delay the settlement of the estate by the executor, and the turning over the interests of the children to their guardian."

The fourth item of the will recites the fact that the testator has large interests with Thomas B. Turner in plantations in Tunica county, Mississippi, planting operations therein, stock, crops, &c., money loaned, &c., and then gives Turner, as survivor and as executor, full and discretionary power to wind up their joint concerns. By the fifth item Turner is appointed executor of the will, and testamentary guardian of the testator's children, without being required to give security in either capacity. The sixth item confers upon Turner unlimited power in the management of the estate, and the sale and re-investment of property. It contains also this clause: "Both as executor and guardian, the said Turner is to see to the support provided for my two sisters, and fix the amount thereof in his discretion; and amounts paid out therefor shall be good

vouchers in his accounts upon his own statement thereof, without receipts or vouchers."

The seventh item gives to Turner full power to manage the estate of the children, to sell their property and make investments, and to regulate their expenditures. The last two items of the will are as follows :

"Item 8. It is my express will and intention that the large powers and discretion hereby given to said Turner as executor and guardian shall be considered as a matter of personal confidence and trust, and as such limited and confined to him, and not in any way to pass to or vest in any other person who may become my personal representative or guardian of my children. As to any other person who may occupy these positions, it is my will that the law, strictly administered, shall be the measure of power, with all the safeguards of bond and security, and all the limitations upon private action and judgment which the law prescribes and provides.

"Item 9. It is my will, and I do hereby expressly provide, that the provision made for my two sisters in item three of this will is to have effect only so long as they shall continue unmarried; and upon the marriage of either of them, the provision will at once cease as to her."

The will was probated, and Turner qualified as executor and guardian in November, 1879. He died April 16, 1883, having been confined to his house for twelve months before his death, and unable during that period to give active attention to business. The complainant, Alsup, was appointed administrator *de bonis non*, with the will annexed, of the testator's estate after the death of the executor, and filed the present bill for the construction of the will. The estate owed no debts of any consequence, and Turner, as executor and guardian, received about \$118,000 of personal assets, about \$90,000 of which, in value, were income-producing stocks and bonds. The testator also died seized of real estate in Tennessee and Mississippi of considerable value. The testator left a widow, who only survived him a few hours, and four children, all of whom were under age at the filing of the bill.

Mrs. Clarke, one of the testator's sisters, was about sixty

years of age when the depositions were taken in this cause, in feeble health, having only one child, a son, of age. Mrs. Hill, the other sister, was about fifty years of age, with four children, the oldest of age. These women had been living for several years before the testator's death, with their children, on a plantation in Tunica county, Mississippi, owned by the testator and Turner, and had been furnished with supplies from Memphis. They were dressed comfortably, and had an abundant table. But they did all the housework themselves, such as cooking, washing, milking, &c. After the testator's death they continued to reside on the place as before, the plantation for the year following the death of the testator being run by Turner, the son of Mrs. Clarke, and the oldest son of Mrs. Hill. Turner then sold the plantation to his associates on time for \$20,000, of which they have paid \$2,000, and the unpaid balance of purchase money is largely more than the property is worth. Neither of the mothers or their children had any property or means, nor have the women ever acquired any. Turner paid them nothing under the testator's will.

By the third item of his will, as modified by the ninth item, the testator charges the real and personal property given to his children with "a comfortable support" for his sisters, "equal to what they now have," so long as they, or either of them, "shall live unmarried, or shall have need of this aid." The charge and bequest are plain and positive, as much so as any provision of the will, not subject to the discretion of any person so far as these items are concerned. And the amount of the charge is fixed with reasonable certainty, for a comfortable support, equal to what they had at the date of his will, February 3, 1875, was susceptible of easy ascertainment. The only point of doubt would be as to the meaning of the words "or shall have need of this aid." Was it the intention of the testator, as now contended for on behalf of his children, to limit the bounty given his sisters, to such a part of the "comfortable support" mentioned as might remain after deducting the wages they, the sisters, might earn for work similar to that performed by them on his place? Or was the intention to furnish them a fixed support, such as they had been in the

habit of receiving from him, until the pecuniary condition of the sisters should be so changed as no longer to require the aid? In the one view, the only bounty would be the mere deficit over wages earned, and the legatees would be required, like a dismissed servant, to seek for employment in order to lessen the charge on their brother's estate. There would be no gift, whatever, if any person, even their own sons, were willing to furnish them board, lodging, and clothing for such services as they could render. We do not think that the testator intended that his bounty, limited as it is, should be measured in this way by a one-ounce vial. He intended to give them a comfortable support for life, measured by their previous habit and condition, without reference to their capacity for work, and whether they worked or not, if their own pecuniary condition continued to require it. And certainly there is nothing in the proof to show any change in this respect. If not supported by the bounty of the testator, they must be supported by the bounty of others or their own labor. The bequests are not made to depend on either of these contingencies, and were intended to give "a comfortable support" out of the estate, that is, board, lodging, and clothing, such as they were having at the date of the will, said support to date from his death.

But, it is argued on behalf of the children, the amount of the bounty is left, by the sixth item of the will, to the unlimited discretion of Turner, and as he paid the sisters nothing in his lifetime, he must have exercised his discretion against them, and as he is now dead the discretion is gone with him. But the power conferred by the sixth item of the will is entirely distinct from the trust or charge created by the third item. The gift continues, even if the power be not exercised. A clear distinction exists, says Judge Wright, between a power and the estate and trusts, the subject-matter of the power. While the power may be gone, or be incapable of transmission, the trusts may still remain and be executed. (*Belote v. White*, 2 Head, 703.) The intention of item sixth was to confer a personal power upon the executor, under which the bounty might have been increased, and not to interfere with the posi-

tive bounty of the third item, for he is expressly required "to see to the support provided" thereby. And even if the two items are to be read together, there would be a power coupled with a trust, and the trust would be executed although the power has not been exercised. (*Robertson v. Gaines*, 2 Hum. 367, 378; *Cruss v. McKee*, 2 Head, 1.) And the courts will act retrospectively in executing these powers as quasi trusts. (*Maberly v. Turton*, 14 Ves. 499; *Edwards v. Grove*, 4 De G., F. & J. 222.)

The Chancellor came to the same conclusion, except that he dates the bequests from the death of the executor, and, upon a reference, fixed the support at thirty dollars a month for each sister, which is well warranted by the proof.

The decree below will therefore be affirmed with the modification above stated, and the cause remanded for the execution of the decree, and such further orders as may hereafter be required. The complainant will pay the costs of the cause out of the assets of the estate.

MATTER OF THE NEW YORK, LACKAWANNA &
WESTERN RY. CO.

[105 New York, 89.]

DEVISE TO ONE ABSOLUTELY WITH REMAINDER OVER.

Where property is devised to one absolutely, and in the event of his death to another, the contingency contemplated is held to be a death in the lifetime of the testator only where there is no evidence in the will of a different intention.

APPEAL from an order of the General Term of the Supreme Court. The opinion states the case.

M. H. McMath, for appellant.

Charles J. Bissell, for respondents.

RAPALLO, J. It may be regarded as a settled rule of construction that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first named devisee during the lifetime of the testator, and that if such devisee survives the testator, he takes an absolute fee; that the words of contingency do not create a remainder over to take effect upon the death, at any time, of the first taker, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator. This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator.

The reason assigned for this construction has been that as death is a certain event, and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period, and no other being mentioned, the time referred to must be presumed to have been the testator's own death. It is also founded upon the principle that in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one which has been adopted would in every case reduce the estate of the first named devisee to an estate for life; for his death at some time is certain, and the words of inheritance attached to the devise to him would in every case be inoperative.

Nevertheless, it has been held that the same rule of construction is to be applied where the alternative devise is made to depend upon the death of the first named devisee "without issue" or "without children," etc. This question is thoroughly discussed in the opinion of Andrews, J., in the case of *Van Derzee v. Slingerland* (103 N. Y. 47), and the learned judge comes to the conclusion that, although the reason upon which the rule adopted in the first mentioned class of cases was founded, does not exist in the second, yet that it is established by precedent. It would be useless now to go through the cases. They are very numerous, and not all

reconcilable, and many of them contain special features. It is sufficient for present purposes to refer to a few of the cases. In *Gee v. Mayor, &c., of Manchester* (17 Adol. & El. [N. S.] 787), the testator devised and bequeathed his real and personal estate to be divided equally among his children as follows, viz.: "I will and bequeath to my eldest son, A., one-seventh share of my property, to his heirs, executors and administrators." Then followed similar devises and bequests to each of the testator's six other children, and afterward a general provision in these words, "and in case any of my sons and daughters die without issue that their share returns to my sons and daughters equally amongst them, and in case any of my sons and daughters die and leaving issue, that they take their deceased parents' share."

It was held that the death referred to was a death in the lifetime of the testator, and that all his children having survived him, they each took a fee simple in one-seventh of his realty.

It must be observed that unless that construction was adopted, the words of inheritance attached to the devise to each of the testator's children must in every event be rejected.

It was certain that each of the children would die, either with or without issue. Construing the death referred to by the testator as a death at any time, the result would be that upon the death of either of the testator's sons, for instance, without issue, his share would go to his brothers and sisters, not as his heirs, but as purchasers by virtue of the limitation over to them. If he died leaving issue, such issue would take in like manner, not as his heirs, but as purchasers. He would have no estate of inheritance in any event, and could make no disposition of the fee in the realty, in his lifetime, or by will. The words of the testator purporting to give him an estate in fee, would thus be wholly rejected, and his estate, under all circumstances, cut down to a life estate.

It was on these grounds that Lord Campbell, in delivering the judgment of the court, held that the only mode of giving effect to all the words of the testator, was by treating the

words in the last clause of the will as words of substitution only, in case of a lapse, and referring the death there contemplated, to a death in the lifetime of the testator.

In *Clayton v. Lowe* (5 Barn. & Ald. 636) the devise was in the same form as in the case last cited. The estate was given to the testator's three grandchildren, forever. If either of them should die without lawful child or children, the share of the one so dying was to be divided among the survivors, but if either should die leaving lawful child or children, such child or children should take the share of the parent. It is obvious that unless the death referred to was a death in the lifetime of the testator, the first named devisees could in no event take a fee.

Doe v. Sparrow (13 East, 359) was a case of the same description, with additional significant words expressly referring to the testator's own death.

Woodburne v. Woodburne (23 L. J. Ch. 336) was the same as *Gee v. Mayor of Manchester*, and was decided the same way.

The cases I have referred to rest on principles, and are founded on reasons which are easily comprehended ; but there are other cases in which the words "die without issue" are construed as referring to a death in the lifetime of the testator, where those principles are inapplicable and the reasons do not exist, and of such cases Andrews, J., in the case of *Van Derzee v. Slingerland*, says that they stand more upon authority than upon reason.

It is stated in Jarman on Wills (5th Am. ed. p. 783), that the general rule is, that where the context is silent, the words referring to the death of the prior legatee in connection with some collateral event, apply to the contingency happening, as well after as before, the death of the testator.

In *O'Mahoney v. Burdell* (L. R. 7 H. L. 388, 393), it was held that a bequest to A., and if she should die *unmarried* or *without children*, to B., was an absolute gift to A., defeasible by an executory gift over in the event of A. dying at any time, *unmarried* or without children, and that this construction could only be affected by a context which rendered a dif-

ferent meaning necessary. And in *Britton v. Thornton* (112 U. S. 536), it was held that under a devise to one person in fee and in case he should die *under age* and without children, to another in fee, the devise over would take effect upon the death, at any time, of the first devisee under age and without children. To the same effect is *Edwards v. Edwards* (15 Beav. 357), and see *Doe v. Webber* (1 Barn. & Ald. 713), and *Anderson v. Jackson* (16 Johns. 382). But it cannot be disputed that there are several cases holding that where there is simply a devise to A. in fee, and in the event of his dying without issue, then to B., the death referred to is a death in the lifetime of the testator, and if A. survives him he takes an absolute and indefeasible estate in fee. (*Home v. Pillans*, 2 My. & K. 15, 19, and cases cited; *Ware v. Watson*, 7 De G., M. & G. 248.) Such appears to be the rule in Pennsylvania (*Mickley's Appeal*, 92 Penn. 514), and the same rule has been adopted in this court (*Quackenbos v. Kingsland*, 102 N. Y. 128), and was recognized in *Van Derzee v. Slingerland* (103 Id. 47), before referred to. But in that case, the learned judge writing the opinion (Andrews, J.), says that the rule established by the courts applies only when the context of the will is silent and affords no indication of intention, other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, and that, indeed, the tendency is to lay hold of slight circumstances in the will, to vary the construction and give effect to the language according to its natural import, and in the will which the learned judge was then construing, he found such indications. I think that similar indications exist in the will now before us. The testator does not charge the legacies upon his daughter Minnie personally, but upon the real estate devised, so they would be borne by whosoever should become entitled to that real estate. He devises the real estate to her without words of inheritance. He then directs that in case she should die without issue, his estate, real and personal, should be possessed and enjoyed by the others named in the will. Her death without issue is a contingent event, but by adopting the construction contended for and claimed to be established by

the authorities, the court would add another contingency not specified by the testator, that is, that she die without issue during the lifetime of the testator. As if to make his intentions clearer, and to indicate that no other contingency was contemplated than the one which he had expressed, the testator adds at the end of the clause, "the devise over to my husband, sister and brothers *to depend* upon the contingency of my daughter Minnie dying without issue." This repetition clearly defines the testatrix's intention that in the event of her daughter's dying without issue, her husband, sister and brothers should enjoy the property, without reference to any other contingency. The daughter was an infant of about six years of age at the time of the death of the testatrix, and it would be a very forced construction of the language of the will to hold that the testatrix had an unexpressed intention that if the child should die the next year, or at any other time, after the death of the testatrix, the devise over to her husband, sister and brothers should not take effect.

Our conclusion is, that Minnie Van Zandt took under her mother's will a base or conditional fee, defeasible by her dying without leaving issue living at the time of her death. (1 R. S. 724, § 22.) That her issue, should she leave any, would take by inheritance from her, but a conveyance by her in her lifetime would be effectual as against them; and that an indefeasible title in fee could be conveyed and the contingent expectant estate limited to the husband, sister and brothers of the testatrix in the event of Minnie dying without issue, cut off, by their joining with her in a conveyance. (*Emmons v. Cairns*, 3 Barb. 243, 246 *et seq.*)

For these reasons we think the order appealed from should be affirmed.

All concur.

Order affirmed.

CHAMBERLAIN *vs.* TAYLOR.

[105 New York, 185.]

CHARITABLE REQUESTS.—EXPRESS TRUST.

Where a testator directed that his residuary estate should be divided into two parts, and that one part should be paid to a religious corporation and the other to a designated college, and gave the residuum to his executors in trust for the payment of the bequests and legacies, with power to sell and convert the estate, real and personal, into money, it was held that the trustees took no title to the property under the will, but that it descended to the heirs of the testator, and that the gifts to the religious corporation and to the college were void.

APPEAL from a judgment of the General Term of the Supreme Court. The opinion states the case.

F. D. Northrup and *William F. Cogswell*, for appellants.

D. H. Bolles and *John G. Hall*, for respondents.

RUGER, Ch. J. This is an action of ejectment to recover possession of one hundred and fifty-six acres of land situate in the county of Cattaraugus, brought by the plaintiffs as executors of the will of Benjamin Chamberlain. The plaintiffs claim that Benjamin Chamberlain died, seized of an estate in fee simple in such land, in February, 1868, and that a power of sale, as well as the title thereto, became vested in them by virtue of the provisions of his will. They also claim that, having executed the power of sale by conveying the lands to one Freeman, in 1880, for a valuable consideration, and such deed being void by reason of an adverse possession in the defendants at the time of its execution, this action is brought, under the statute, for his benefit, to recover such lands.

It is an elementary rule in ejectment, that the plaintiff must recover, if at all, upon the strength of his own title, and

not upon the weakness of his adversary's, and this being so, it will be unnecessary to consider the defenses pleaded in the answer, unless we come to the conclusion that the plaintiffs derived title to the premises under the will of the testator. Upon the trial, the court directed a verdict for the defendants, holding that the plaintiff had shown no title in the premises, and the General Term, on appeal, affirmed such judgment.

The question presented is determinable by the provisions of the will, and such additional force as may be given to the plaintiff's claim, by reason of the conveyance to Freeman, and the provisions of the statute authorizing an action for his benefit in the name of his grantors.

The provisions of the will are somewhat voluminous, but, so far as they bear upon the questions under discussion, are substantially comprised in its eighteenth and twenty-second subdivisions, which read as follows: "18th. I hereby further will and direct that all my estate, not otherwise hereinbefore disposed of, be divided into two equal parts, one of said parts to be paid to the Centenary Fund Society of the Erie Annual Conference of the Methodist Episcopal Church, to be by said corporation invested, and kept permanently invested, and the interest and income thereof used and expended by said corporation for the benefit of Allegany College at Meadville, Pennsylvania, in such manner and for such specific purposes as said corporation shall direct; and that the other of said parts be paid by my executors to the trustees of the Chamberlain Institute, to be by said trustees permanently invested in bonds and mortgages upon productive farming lands in this State; such mortgages to be first liens. The said principal to be kept permanently invested, and the interest and income thereof to be received by said trustees and by them used in the payment of the salaries of tutors and professors employed to teach in said institute, and in purchasing books and apparatus for the library of said institute," etc. "22d. I hereby further nominate and appoint as executors of this, my last will and testament, Thomas J. Chamberlain, Amos Dow, Charles P. Adams and Alonzo Kent. And I give, bequeath and devise

all my real and personal estate not hereinbefore specially devised and bequeathed, to my said executors in trust for the payment of the bequests and legacies hereinbefore specified and ready to be paid; and for the purpose of executing such trust I hereby authorize and empower them to sell and convert all my real and personal estate into cash, and for that purpose authorize them to execute and deliver the necessary conveyances, assignments and releases of the same, and to sell such estate or any part thereof at such time or times and upon such terms as to them shall seem proper."

It is, of course, well settled that a general devise of lands in trust to executors, to sell and convey them, vests no title in the trustees. (*Manice v. Manice*, 43 N. Y. 304.) It will be observed that the testator has not, by any express language, attempted to vest the title of his real estate in his executors, and that, is not claimed by the appellants, but they seek to imply his intent to do so from a consideration of the various provisions of the will, and mainly from that authorizing them to convert his real estate into cash. An unanswerable objection to such an implication seems to us to arise from the express provision of the statute relating to uses and trusts, which practically forbids it unless, in addition to the creation of a valid trust, the power to take the rents and profits is also given to the executors. It is not claimed that the devise contained in such clause is brought within the description of any of the express trusts, authorized by statute, unless it may be that permitted by subdivision 2 of section 55, article 2, title 2, chapter 1, part 2 of the Revised Statutes, allowing the creation of a trust, "to sell, mortgage, or lease land for the benefit of legatees, or to satisfy charges on it." We are, however, of the opinion, for several reasons hereafter stated, that such a trust was not thereby created. The will directs the executors to divide the testator's whole residuary estate into two parts; one of which is directed to be paid to the Centenary Fund Society, and the other to the trustees of the Chamberlain Institute, and for the purpose of making such division they are authorized and empowered to sell and convert all of his real and personal estate into cash. Undoubtedly a strong im-

plication arises from the use of the word "paid" in directing the satisfaction of the legacies, that it was intended by the testator that the real estate should be converted into money, and thus handed over to the legatees, but there is no imperative direction given to sell the lands, neither do the purposes of the will require such a sale, and a legal performance of the duties enjoined upon the executors could have been effected by a distribution of the property in specie, to the legatees. The distribution or division of the residuary estate between the named legatees, was the main object contemplated by the testator, and not its sale, and although he might have intended a conversion of the real estate, it does not effect the transfer of the title, unless the intention to do so is manifested in the mode and language required by the statute. That expressly provides in the case of such a trust that no estate in the land vests in the trustees unless they are also authorized to receive its rents and profits. (§ 56, *ante*.)

Although the provisions of the will are inoperative to create a valid express trust under the statute yet the power therein conferred might still be exercised as a power in trust, but in that event it is also expressly provided that the title shall descend to the heirs at law, subject to the execution of the power. (§§ 56, 58, 59, R. S.; *Cooke v. Platt*, 98 N. Y. 35; *Konvalinka v. Schlegel*, 104 Id. 125; *Downing v. Marshall*, 23 Id. 366.) It was held in *Cooke v. Platt* (98 N. Y. 35), that a merely discretionary power of sale in the executors for purposes of distribution, even though connected with the right to receive the rents and profits, did not vest them with title to real estate. Much less would this be so where no power to take rents and profits was given by the will, or inferable from the purposes therein contemplated. (See, also, *White v. Howard*, 46 N. Y. 144.) The cases of *Lent v. Howard* (89 N. Y. 169, 175) and *Donovan v. Van De Mark* (78 Id. 244), cited by the appellants, are not in conflict with the views expressed, but rather tend to support them. In the first case it was held that the will did not vest the title in the executors, but it descended to the heirs; but under the special provisions of the will, it was de-

cided that the right to the rents and profits of the real estate was separable from the right to the possession, and those received by the executors, intermediate the death of the testator and the execution of the power of sale, were intended to be given to and belonged to the executors for the purposes of the will.

In *Donovan v. Van De Mark* it was held that the will devised the real estate to the executor in trust, with power, either directly or inferentially, to receive the rents and profits and apply them according to his judgment, and that therefore a valid trust was created and a legal title vested in the trustee. In that case the right to take the rents and profits was by the will clearly intended to be given to the executor and in that respect it differs from the case at bar.

The argument, that title in the executor was to be implied from the intent expressed in sections 18 and 22 to give it to them, is effectually refuted by reason of the adjudication of this court, in *Chamberlain v. Chamberlain* (43 N. Y. 424), holding that said devises were invalid to the extent of one-half of the residuary estate, as being in conflict with the provisions of the statute forbidding testamentary bequests to religious and other charitable societies or corporations, in certain cases, in excess of one-half of the testator's property. (Chap. 360, Laws of 1860.) The case shows that the real estate of the testator embraced but a small portion of his property, and that the personal estate was much more than sufficient to satisfy all of the valid legacies. It was, therefore, the duty of the executors to satisfy such legacies from the personal estate, and resort to the real estate, for such purpose, could be had only when they were expressly charged upon it. An intent to satisfy these devises by a sale of the real estate cannot, therefore, be drawn from the provisions of this will. It is clear that there has been no valid devise of the land, either to the executors or to any other persons, and nothing to prevent its regular descent to the legal heirs of the testator. It is a settled principle of law that the legal rights of the heir or distributee, to the property of deceased persons, cannot be defeated except by a valid devise of such property to

other persons. (*Haastun v. Corse*, 2 Barb. Ch. 506, 521; *Jackson v. Schaubert*, 7 Cow. 187, 195; *Post v. Hover*, 33 N. Y. 493, 597; *White v. Howard*, 46 Id. 144; *Hawley v. James*, 16 Wend. 61.)

It was said by the chancellor in *Haastun v. Corse* (2 Barb. Ch. 521), that "it was not sufficient to deprive an heir at law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate. But to deprive an heir or distributee of his share of the property which the law gives him in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person." It is, therefore, quite plain that the executors did not take title to the lands in question under the will, unless such claim can be supported upon some other theory than the one discussed.

It is, however, urged that the authority given the executors to sell and convey the real estate for the purposes of the will worked an equitable conversion, and so changed its character as to take it out of the operation of the rules provided by statute, for the descent of real estate. As we have seen, under the construction given to this will, there was no necessity in satisfying its purposes, that there should be a conversion, and equity will never presume a conversion unless it is demanded to accomplish the lawful purposes expressed in the will by the testator.

Judge Allen said, in *Chamberlain v. Chamberlain* (43 N. Y. 431): "*If the residuary bequests are valid*, there was an equitable conversion of the whole estate into personalty;" but he then proceeded to show that they were valid only to the extent of one-half the value of the property, and it follows, as a corollary to such conclusion, that an equitable conversion had not taken place. This question came under consideration in *White v. Howard* (46 N. Y. 162), where Grover, J., said; "To constitute conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustees to sell in any event, such con-

version rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result." It was also held in that case that so far as the will made no valid disposition of the real estate, it vested in the heirs.

While, in the determination of the claims of heirs, devisees and legatees arising under a will, the law will consider a conversion of real into personal property to have taken place for certain purposes in special cases, it never does so unless there has been a valid devise of the property in dispute in some form to a specified beneficiary, and the purposes of the will require it to be done. It was said by Judge Earl, in *Wilder v. Ranney* (95 N. Y. 7, 12), that "there may have been a conversion of this real estate into personalty for many purposes, but not for all purposes. It physically remained real estate, taxable as such, controllable as such, and it could only be conveyed as such, and the rules of law generally applicable to real estate remained applicable to this."

In that case it was held that an equitable conversion of the real estate did not authorize its sale and conveyance by one executor without the co-operation of his co-executor.

The decision in this case might also, we think, have been rested altogether upon the former determination of this court in *Chamberlain v. Chamberlain* (*supra*), which rendered the questions therein determined *stare decisis*. The validity of the trust attempted to be created by the provisions in question, having there come under consideration, it was held that, in so far as the testator attempted by the residuary clause to give to the institutions therein named, more than one-half of his residuary estate, his effort was ineffectual, and that such portion of his estate as was not well disposed of by will, descended to the testator's heirs at law and next of kin. Under this decision, and in accordance with the *remittitur* transmitted to it, judgment was on the 3d of October, 1871, entered in the Supreme Court, in the clerk's office of Cattaraugus county, by which it was determined "that the real estate of the said Benjamin Chamberlain, which he held or owned at the time of his decease, descended to his heirs at law, subject to the execu-

tion of such of the valid and effectual provisions of said last will and testament as relate to or affect the same," and exempt as aforesaid from any claim or right of dower on the part of the said Lucy Chamberlain, and that in case, after the payment of the debts of the testator and the execution of the valid and effectual provisions of said last will and testament, "there shall remain any surplus from the personal estate of said testator, such surplus shall, and is hereby declared and held to belong to and shall be distributed and divided between and among the next of kin of said testator as their rights shall appear, in the manner provided by law in cases of intestacy."

The action in which this judgment was rendered was brought by one Calvin J. Chamberlain in behalf of himself and the other heirs at law and next of kin of Benjamin Chamberlain against the plaintiffs herein, the executors of the said Benjamin Chamberlain, and the principal legatees under such will to obtain a construction of its provisions. A necessary result of this determination, under the doctrine of *stare decisis*, is to foreclose all parties from the right or privilege of re-opening or discussing again the questions therein determined.

It was said by Denio, J., in *Towle v. Forney* (14 N. Y. 423), that "the cases, however, are extremely rare in which the determination of the highest appellate court can be properly departed from, when the same legal question arises before a court of the same government. If it shall be thought that an erroneous rule has been established by the adjudication relied on as a precedent, it is better that it should be changed by the legislature, by an act which cannot retrospect, than that the courts should overturn what they have themselves established, and thus disappoint all who have acted upon the rule which had been considered settled. If this is so where an abstract rule of law determined in a prior case is sought to be applied to new facts, the reason is stronger when, as in this case, a series of particular acts has been passed upon and held to produce a given legal result and the same identical facts are again before the court between other parties. In such a case,

there being no pretense of collusion and no reason to impute carelessness or inattention to the judges, the determination should be considered final or conclusive upon all persons in interest or who may become interested in the question, as well as upon the parties to the particular action." (*Chase v. Chase*, 95 N. Y. 373.)

The application of this doctrine to the case in hand seems peculiarly appropriate, inasmuch as a large estate has been administered by the present plaintiffs, in accordance with the principles declared in the former decision, and the entire known property of the testator converted and distributed among the heirs at law, next of kin and legatees, by a judicial settlement before the surrogate, acquiesced in by all parties interested. As early as 1875 a large sum derived from the residuary estate had been equally distributed by judicial proceedings, between the residuary legatees and the next of kin, and said legatees had executed and delivered to the plaintiffs proper vouchers acknowledging full satisfaction of their legacies.

But one question remains to be discussed, and that relates to the effect which the deed from the executors to Freeman has upon this action. It is clear that such a deed being void under the statute could have no affirmative effect in supporting the cause of action. While the statute in such a case authorizes the grantee in the deed to maintain an action in the name of his grantor to recover possession of the lands described, from the occupant thereof, it is obvious that such deed adds nothing to the original right of the grantors. (§ 1501, Code of Civ. Pro.)

The intent of the statute was to enable the grantee to avail himself of a title which overreached the right of the adverse possessor, and bar such possessor from making the objection that the plaintiff in the action had parted with his title. Such an action can be maintained independent of the consent of the grantor, and is supposed to be conducted by the grantee alone for his own benefit, but it must necessarily be sustained, if sustainable at all, upon the validity of the title originally existing in his grantor. It is brought in his name

and upon the theory of an original right in him to the possession of the property. But it has been seen that the plaintiffs never acquired any title or right to the possession of the disputed premises. The title to the premises originally existing in their testator passed at the time of his death to his heirs, and from that time they alone had a right to the property, and the exclusive right to maintain an action for its possession.

The power of sale given by the will to the executors could be made effectual only by its valid exercise, and this it is clear has never been effected. They stand, therefore, as plaintiffs in this case, precisely as though its exercise had never been attempted, and they were asserting only the rights in the property which the will gave them. As we have before shown, they did not take the title by the will, and they have shown no other right to recover in this case.

The judgment should be affirmed.

All concur.

Judgment affirmed.

McKEEGAN vs. O'NEILL.

[22 South Carolina, 454.]

AGREEMENT TO DISPOSE OF PROPERTY BY WILL.

One may so bind himself to dispose of his property in a certain way by will that, upon his failure to do so, the agreement, if clearly established, may be enforced after his death against his legal representatives.

ACTION against legatees to recover an estate pursuant to an agreement of the testator. The opinion states the case.

McCrady, Sons & Bacot, for appellant.

DeSaussure & Son, B. H. Rutledge, contra.

SIMPSON, C. J. John McKeegan, late of Charleston County, departed this life about August 10, 1881, at Charleston, unmarried, and without children or lineal descendants. He died possessed of considerable estate, both real and personal, situate in Charleston and elsewhere in the State. He left a will, in which his said estate was disposed of as follows: a house and lot in the city of Charleston was devised to a former slave of his, Robert Morrison, a legacy of \$1,000 was given to the "Sisters of Our Lady of Mercy," in the city of Charleston, \$500 to one Ella O'Neill, \$500 to Bella O'Neill, \$500 to Mary Janney, and \$500 to the Very Reverend Daniel J. Quigley, and the remainder he devised and bequeathed to his executors upon certain trusts therein set forth, nominating Bernard O'Neill and the Very Reverend Daniel J. Quigley as his executors, both of whom qualified.

During the life of the testator he was seized and possessed of a certain estate in the County of Antrim, Ireland, commonly known and called "Cloneymore." This estate, it seems, he owned as far back as 1839, which, under some arrangement, he permitted his brother, one Francis McKeegan, the father of the plaintiff, to occupy, and, as alleged in the complaint, free of rent or charge, except taxes, rates, and assessments, and also an annual allowance of £10 sterling to be paid to another brother, James McKeegan, the said Francis having occupied the same under said terms from 1839 to 1875, when he died.

Shortly after the death of the said Francis, the plaintiff opened a correspondence with his uncle, the said John McKeegan, as to this estate, which resulted in the purchase of Cloneymore by the plaintiff at £1,400 sterling cash, which was paid, and titles executed in fee simple. The plaintiff alleges in his complaint that he was induced to make said purchase by a written agreement made by his uncle with him, that if he would purchase Cloneymore at the price of £1,400 sterling, at that time equivalent to \$7,700, he, the said John McKeegan, would at his death give and leave him, the plaintiff, all he was worth; that is, all of the property, real and personal, of which he might die possessed; that, acting upon this promise and inducement, and at great inconvenience, sacrifice,

and expense to himself, he did raise the said sum and paid the same to the agent of the said John McKeegan, from whom he received title deeds to Oloneymore in fee simple.

John McKeegan having disposed of his entire estate, as hereinbefore stated, to other parties than the plaintiff, the action below was instituted, in which the plaintiff demands judgment that the executors of the said John McKeegan may be compelled to perform the agreement above, and to pay over, transfer, and deliver all of the property of their testator to him, the plaintiff, in pursuance thereof.

The case was heard by his honor, Judge Kershaw, upon testimony taken by the Master and reported to the court, who in an elaborate decree dismissed the complaint with costs.

The exceptions to the decree by plaintiff, appellant, are numerous, but they may be disposed of, we think, in the discussion of the following grounds: 1. What is the law applicable to a case of this kind, and did his honor lay it down correctly? 2. Did the testimony bring the case under this correct principle? And 3. Did his honor reach his conclusion as to the facts by the admission and influence of certain alleged incompetent testimony objected to by the plaintiff?

As to the first question, there is authority for the position that while a man may ordinarily by will dispose of his estate, either in whole or in part, at his pleasure, nay, even at his caprice, yet he may also bind himself to dispose of it in a certain way or to certain parties, and in failing to do so, his agreement may be enforced against his legal representatives. This proposition is sustained by the following cases cited from our own reports: *Izard v. Middleton*, 1 DeSaus. 116; *Grimke v. Edrs of Grimke*, Ibid. 366; *Rivers v. Edrs of Rivers*, 3 Id. 190; *Gary v. Edrs of James*, 4 Id. 185; *Caborne v. Godfrey*, 3 Id. 514. Besides it is supported by numerous English cases cited in appellant's argument.

It is true, however, in all the cases, in view of the fact that a will is the free, voluntary, and uninfluenced expression of a testator as to the disposition of his property, which in fact he may make or not as he chooses, and when made revocable if he desires; that for one to be bound to dispose of his property

in a certain way by will, the agreement or contract requiring him to do so must be established by the most satisfactory proof and after the strictest and most thorough examination of all circumstances attending it; or, as was said by Chancellor DeSaussure in *Rivers v. Ex'rs of Rivers* (*supra*): "To be sure, the court would be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proof of the fairness and justness of the transaction."

The above proposition being conceded, we are led next to the inquiry: What is an agreement, and under what circumstances does it become binding on the parties? Agreements may be divided into two classes, distinguished by the mode in which they are made. 1. The ordinary agreement, where an intentional offer is made on the one side founded upon a sufficient consideration, and an intentional acceptance on the other, resulting in the meeting of minds upon the same terms. 2. "Where it is created by representations made by one party and acts done by the other upon the faith of such representations. When an absolute, unconditional representation of something to be done in the future is made by one person in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the acts by which the intended result is obtained and purpose accomplished, a contract is thereby concluded between the parties." (3 Pom. Eq. Jur. § 1244.)

The first is a contract at law and the second a contract in equity, and a disposition of property by will may be made the subject-matter of either as well as any other subject-matter. The following proposition, laid down in appellant's argument, we think is a correct result from all the cases on this subject, *i. e.*, "That to make a will in a particular way, on proper consideration, is as much a subject of contract as any other, and he who makes a contract on this subject is as much bound thereby as he would be by any other agreement on any other subject." It is said, however, by Mr. Waterman, which is in accordance with the caution already adverted to, that when the subject of the contract is the disposition of one's property

by his will, "such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained except upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the decedent." Now, no error can be attributed to his honor, the Circuit Judge, on the ground that he failed to recognize the possible existence in law of these two classes of contracts. On the contrary, he recognized both, but he failed to find facts sufficient for the application of either, and it was upon this ground that he dismissed the complaint.

We do not think, therefore, that the decree of the judge, when read as a whole, is obnoxious to the seventeenth exception. Was his finding error? Generally, as we have had frequent occasion to say, in appeals in Chancery cases, where the facts are found by the Circuit Judge upon testimony, this court will not disturb such findings unless the manifest preponderance of the evidence is the other way. And if in this case the findings of fact below rested entirely upon evidence, the rule referred to would be applicable. But the plaintiff here claims under what he styles a written contract, found in a certain letter of his uncle, the intent of which is a matter of construction; and construction of instruments being a matter of law, the question whether John McKeegan made the agreement relied on by the plaintiff is fully before us, at least so far as it depends upon the construction of the letter in question. The letter referred to is as follows :

" CHARLESTON, 22 March, 1876.

" *Mr. F. McKeegan.*

" DEAR SIR : This morning I got a letter from Mr. McNeill and one from you, relating to Cloney. I have sent all the power of an attorney to Mr. Nelson, and the title deed and map of Cloney, yesterday, according to Mr. McNeill's letter of request. I have other papers pertaining to the same which I will send, if wanted. My price for Cloney is 1,400 pounds cash, and to any one else 1,500 pounds sterling. Mr. Nelson takes charge of the sale, the same as if I were there. What-

ever he does in the selling of Cloney is binding and right. Why did you not say what Cloney was worth in your letter, as I wanted you to do? My price to you is already said on the other side, 1,400 pounds sterling cash, to any one else it will be 1,500 pounds, but you will get all I am worth at my death. Please let nothing happen the property until it is sold.

"JOHN McKEEGAN."

It is proper here to notice with somewhat more particularity than above the facts and circumstances surrounding John McKeegan when this letter was written. As we have already stated, Francis McKeegan, Sr., the father of the plaintiff, went into possession of Cloney in 1839, and remained in possession until 1875, when he died. The plaintiff during this time had grown up and married, and was living upon Cloney and cultivating a portion of it, paying part of the expenses attendant upon the possession. It was understood during all this time in the family of Francis, Sr., that at the death of John McKeegan Cloney would be theirs by will of the said John.

On the death of Francis, Sr., the plaintiff immediately wrote to his uncle John informing him of that event, and also that his elder brother, Alex., would have a place, and, stating his own embarrassed situation, asked as a great favor to him that he might rent one-half of Cloney and half of the house, proposing to secure the rent, and saying that the other half would be sufficient for his mother and his brother John. This was November 8, 1875, two days after the death of his father. Receiving no answer, he then, on December 30, 1875, addressed a letter to Mr. Bernard O'Neill, of Charleston, informing him that he had heard that his uncle intended to sell Cloney, and imploring him, Mr. O'Neill, to see his uncle and learn from him if he would not let his brother John and himself have the first offer, and to know his price. On February 19, 1876, having received a reply from Mr. O'Neill, he again wrote to him, thanking him for the information, "the manner and terms," and stating that he could raise the funds for the purchase, and further, that he would leave the value of the property to his uncle, and urging him to learn whether his

uncle would accept his proposition. The letter above referred to from Mr. O'Neill, to which this was a reply, the plaintiff failed to produce. No doubt, however, from the reply, that the "terms" were mentioned.

About this time the plaintiff received a letter from his uncle, but this letter he failed also to produce on the trial. To this letter he replied on March 2, 1876, acknowledging the receipt of his uncle's letter, and saying that he consulted Mr. Robert Nelson, to whom his uncle had referred him, about the present value of Cloney, and stating that if he (his uncle) intended to sell Cloney to him he would leave the value to him, saying he could get two-thirds of the purchase-money from the board of trade; and further, that he could get the other third in some way. He also enclosed a letter from an attorney, Mr. O'Neill, of Larne, conveying instructions as to drawing the papers necessary to the trade. On March 22d, 1876, John McKeegan replied in the letter first above mentioned, which is the letter upon which the case turns. In the meantime, and before the trade was concluded, some correspondence took place between Mr. Nelson and Francis McKeegan as to the value of Cloney, but as the originals of these letters were not produced, and the copies were objected to, they will for the present be omitted.

Now, looking at this important letter from the standpoint of these surroundings, did his honor, Judge Kershaw, err in holding that there was no contract therein embracing the property now claimed by the plaintiff? There was certainly no contract in express terms in the sense that a proposition was made and accepted for anything besides the estate of "Cloney." The negotiation up to this time between the parties referred to nothing else. The letters of Francis McKeegan indicated an earnest desire to obtain an interest in Cloney. At first he desired to rent one half, but learning that it was the intention of his uncle to sell, he then became anxious to buy, and was willing for his uncle to fix the price, and distinctly made that proposition, first through Mr. Bernard O'Neill, and then in a letter to Mr. John McKeegan himself. Nothing had been said about the estate of John McKeegan in

America. Nor does it appear anywhere that John McKeegan was at all anxious to sell Cloney to any one, nor that it would be a difficult matter to make a sale thereof. Nor does it appear in the letter that John McKeegan considered the value of any other property besides Cloney in fixing the price at which he was willing to trade. He thought "Cloney" was worth £1,500, but to his nephew he would let it go at £1,400, and it is manifest that there was no distinct, positive, and absolute contract made as to anything except Cloney, and that Francis McKeegan did not understand it to be a clear and distinct contract for more, is evidenced by the fact that he consulted his attorney, and afterwards, under the hope of fixing it, had the letter stamped, and this, too, without the knowledge of his uncle.

Was there a contract of the second class mentioned above? *i. e.*, "When absolute, unconditional representation of something to be done in the future is made by one person in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the acts by which the intended result is attained and purpose accomplished, a contract is thereby concluded between the parties." To bring a case under this principle it must appear that the party sought to be bound desires to bring about a certain result, and that in order to accomplish his purpose he makes an absolute, unconditional representation that he will do something in the future, and that the party to whom it is made, relying upon it, does the act required. Or to make a specific application to the case at bar, it should appear that John McKeegan desired to sell Cloney to Francis McKeegan, and in order to consummate the sale he made an absolute and unconditional representation to him that if he would purchase he would leave him all of his estate, and that, relying on this representation, Francis closed the trade and took Cloney.

Do these facts appear either in the letter or in the evidence, or in the two combined? In the first place, it does not appear that John McKeegan was at all anxious to part with Cloney to any one, much less to Francis. The anxiety was all on the side of Francis. He wrote to his uncle within two days after

the death of his father, and receiving no reply, he then wrote to Bernard O'Neill imploring him to intercede in his behalf, proposing to buy upon terms to be fixed by his uncle, and then wrote a second letter to Bernard O'Neill, thanking him for information received as to the "manner and terms," stating that he could raise the necessary funds. These letters were all couched in the most earnest terms, and followed each other in quick succession.

John McKeegan finally replied to these earnest appeals, stating his price, and leaving it to Francis to say whether he would accept. It was in this letter, after stating to Francis that his price to him was £1,400, if to any one else £1,500, he added, "but you will get all I am worth at my death." Was this an unconditional statement that if Francis would take Cloney at the price mentioned, that in consideration thereof he would, in addition thereto, leave him all of his estate at his death? Was it made to induce Francis to take Cloney, and did Francis act upon it with that understanding? Would he have declined the purchase but for that representation? We cannot think so; we cannot think that John McKeegan ever intended the statement in that sense, or that Francis ever so understood it, or so acted upon it.

There is no sufficient and satisfactory evidence in the case showing that "Cloney" was worth less than £1,400, even with the tenancy rights (whatever they might have been) upon the place. The plaintiff's testimony on that subject is very guarded. He says: "At that time the value of Cloneymore to me was not £1,400." The plaintiff makes no offer to rescind. There is no evidence that there was any pressure upon John McKeegan requiring him to sell, or that Francis was likely to be the only purchaser. In fact, Francis deprecated a public sale, and urged that this should not be had, and earnestly requested that he and his brother John should have the first offer. The case is entirely destitute of any fact showing a reason or motive why John McKeegan should hold out such an unusual and extraordinary inducement for such a trade. The only fact indicating that Francis ever conceived the idea that the whole estate of his uncle was embraced is the fact

that he consulted his attorney and had the letter stamped. Why did he not consult Mr. John McKeegan? If in his opinion the promise was so vague and doubtful as to require the opinion of an attorney, why, before acting, did he not have a distinct understanding with his uncle? and why, without any information to him at the time, or ever afterward during his life, did he have the letter impressed with sixpenny stamps?

The natural explanation of the remark in the letter, "But you will get all I am worth at my death," seems to us to be as follows: John McKeegan had acquired a considerable estate in this country; he was an old man, without wife or children. His relatives lived in Ireland; he had been kind to them, especially to the family of his brother Francis; and it was the understanding, no doubt, with the knowledge of John, that at his death his kindness during life would be followed up by leaving to his family his estate here. No doubt he intended to do this, and when he wrote this letter this intention was present to his mind—not as a part of the proposed sale of Cloney, but as a long existing intention, altogether disconnected from Cloney, and this remark was thrown in, not as an inducement for Francis to buy, but as a reason why he was willing to take from him £100 less than from any one else. "I think the place," said he, "is worth £1,500, and if I was dealing with strangers I should demand that sum, but you are to get my estate at my death any way, and I will let you have Cloney at an under value." This is far more reasonable than that he was selling not only Cloney, but his whole estate, for £1,400, Cloney to be delivered at once, and the estate at his death. At all events, the proof of the contract fails entirely to come up to the requirement of the cases cited.

It is urged, however, that there are numerous cases where the language used in a letter was not stronger than that used here, and yet the court held that a contract was established. And the following cases are referred to: *Gary et ux. v. Executors of James*, 4 DeSaus. 185; *Caborn v. Godfrey*, 3 Id. 514; *Goilmore v. Battison*, 1 Vern. 48; *Wankford v. Fotherley*, 2 Id. 322; *Hammersly v. Baron de Biel*, 12 Clk. & Fin. 45; *Bold v. Hutchinson*, 5 DeG., M. & C. 558; *Ridley v.*

Ridley, 34 Beav. 478; *Coverdale v. Eastwood*, 5 Eng. Rep. (Moak), 755; *Sutton v. Hayden*, 62 Mo. 101. We have examined each of these cases, and find the proposition stated by appellant fully sustained. The language used in each of them is very similar to that employed in the letter of McKeegan. For instance, in the last case referred to, it was: "All her property should at her death be her niece's."

There is a marked difference, however, between the case at bar and all of these, a difference which vindicates the judgment in the latter cases, and yet prevents the application to the former of the principle upon which said judgments were founded. In many of the cases cited, the act done by the promisee was founded primarily and entirely upon the promise made. It had no other consideration. To illustrate: In *Sutton v. Hayden* (*supra*) an aunt had written to the guardian of her niece promising that if she would come and live with her and nurse and take care of her for the remainder of her days, all her property should at her death be her niece's. The guardian assented to the arrangement, and the ward faithfully carried it out. So in the case of *Gary et ux. v. Executors of James*, 4 DeSaus., *supra*. "The father, who had separated from his wife, wrote to his daughter: If you will come and live with me, you shall be the object of my care, and shall enjoy all the attention that can be bestowed by a tender father. You are the object of my love, and shall be the heir of my property." In both of these cases the contract was undoubted, and it was properly enforced.

In the other cases the promise was equally apparent, not, however, from the terms used simply, but because founded upon circumstances in the nature of marriage settlements, as in the case of *Coverdale v. Eastwood*, 5 Eng. Rep., *supra*, and *Caborns v. Godfrey*, 3 DeSaus., *supra*. In the former case, in contemplation of a marriage between a Mr. John Coverdale and a daughter of Eastwood, the mother of Coverdale wrote to Mr. Eastwood, stating that her son was willing to settle £4,000 on Miss Eastwood, and inquiring whether he would make a corresponding settlement. To this Mr. Eastwood replied that his business was not in condition to extract £4,000 from it,

but that he had some years before made a will in which he had left his property to trustees for the use of his daughter, and in the event of the marriage taking place, it was his intention to make a will in accordance with the facts of the case, and of course he would settle his property on his daughter in strict settlement, &c., &c. "I will take care that my property, which I suspect will exceed £4,000, shall be properly secured upon her and her children after my death." Held, that the above expression of intention amounted to a contract to settle the whole property upon the daughter in strict settlement. In the cases found in 1 and 2 Vern., and 5 DeG., M. & C., *supra*, the promise was distinct and positive, and based on an event which was to happen, marriage or otherwise.

The case before the court is destitute of any fact of the kind mentioned in either of the classes of cases above. "Cloney" was the matter about which negotiations between the parties had been going on; nothing else was ever mentioned in any letter of the plaintiff, either to John McKeegan or to any one else. "Cloney" was the primary and, as it appears to the court, the only consideration for the payment of the £1,400. The remark of John McKeegan that the plaintiff "would get all of his property at his death," was not put upon the event of the purchase of Cloney, or as dependent in any way upon the negotiation in reference to "Cloney," but was a mere statement of what he, John McKeegan, had intended to do long since, voluntarily, and without regard to any consideration moving him thereto.

And it does not appear to the court that the value of Cloney is at all involved, or whether it was encumbered with tenancy rights, thereby reducing its present value to a purchaser. The plaintiff distinctly proposed, as we have already said, to purchase at a valuation to be fixed by the vendor, and this before the letter in question. That valuation was fixed and accepted, and the trade was consummated by the payment of the purchase-money and the execution of the titles, and in pursuance thereof the plaintiff has been in possession for the last eight or ten years, without one word or whisper having ever been heard from the plaintiff that he had titles also to the

estate of his uncle until the death of his uncle, when for the first time the claim is made upon his executors.

It perhaps would have been more in accordance with the promptings of nature that this old man should have left his estate to his relatives, but this estate was the fruit of his own labor and toil. He had earned and made it, and it belonged to him, and under our law, which is one of its boasts, he had the right to dispose of it as to him seemed best; and this, too, whether the disposition was moved by a sufficient and commendable motive, or by caprice; and having done so, although it has defeated the reasonable and natural expectation and hope of the plaintiff, there being no allegation or proof of undue influence, deception, or fraud, it must stand.

From the view which we have taken of the facts of this case, independent of the alleged incompetent testimony, we do not deem it necessary to determine whether the exceptions of the plaintiff in that respect are well founded. Because, even admitting the incompetency of this testimony, we think the decree of his honor is abundantly sustained by that portion about which there is no dispute. Nor is it necessary to say more than we have said above in reference to the encumbrance upon "Cloney" of the tenancy rights referred to in the argument.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

HOITT vs. HOITT.

[63 New Hampshire, 475.]

REVOCATION OF A WILL.—DECLARATIONS OF THE TESTATOR.— EVIDENCE.

The revocation of a will is not effected by the death of legatees or devisees named in it; nor by the marriage of the testator, there being no issue of the marriage; nor by the alienation of the larger portion of his estate, which was

specifically disposed of by the will; nor by the acquisition of other estate to an amount much greater than he possessed at the time the will was made; nor by the concurrence of all the above circumstances.

Declarations of a testator to the effect that he understood a will made by him was revoked, are not admissible on the question of revocation. Declarations of a testator as to his intention in the disposition of his property, are not competent evidence from which to ascertain his intention as expressed in the will.

APPEAL from a decree of the Probate Court.

Augustus Russ, Jeremiah Smith, and Dodge & Caverly,
for the appellant.

Marston & Eastman and Frink & Batchelder, for appellee.

BLONDETT, J. No express revocation appears in this case. The will of the testator, executed in accordance with the statute formalities, has not been revoked by any subsequent "will or codicil, or by some writing executed in the same manner, or by cancelling, tearing, obliterating, or otherwise destroying the same, by the testator, or by some person by his consent, and in his presence," as required by Gen. Laws, c. 193, s. 14. On the contrary, it was found in his safe after his decease, and in its original condition. It is true that it was in a bundle of papers of no pecuniary value, and "included in this bundle were several apparently incomplete drafts or memoranda of wills never executed, without date, some of which were apparently made since the date of said will."

But *Fellows v. Allen* (60 N. H. 439, 441) is a recent and direct authority that the fact of a will being found among worthless papers works no revocation of it; and the authorities, as well as reason, demonstrate that the memoranda which, at most, are merely evidentiary facts of an inchoate intention to make another will, have no legal significance as acts of revocation; for, although the purpose of the mind always gives character to the act done, still, the legislature having established certain modes by which a will may be revoked, it is not within the legitimate power of courts to dispense with such

requirements, and accept even a definite intention to perform the prescribed act for the act itself.

Neither has the will become inoperative, as a whole, from necessity, either by an entire loss of the testator's estate, or its total alienation, or by the decease of all the devisees without descendants, and so leaving nothing upon which it can operate.

If, therefore, there has been a valid revocation, it must be one arising from legal presumption or implication; and this, in fact, is the principal contention.

The existing statute as to the revocation of wills, which was originally adopted in 1822, after pointing out the modes by which a will may be revoked, expressly excepts any revocation implied by law from changes in the circumstances of the testator, his family, devisees, or estate, occurring between the time of making the will and his death. (G. L., c. 193, secs. 14, 15.) But what those changes are sec. 15 does not in any manner attempt to define; and the effect consequently is, to leave the matter of revocation by legal implication just as it stood before the enactment of that section. That is to say, sec. 15 (which, in the act of 1822, was a proviso to what is now sec. 14) is to be taken, not as a recognition and adoption of the common-law doctrine of implied revocation, but as a recognition and adoption of the English decisions under secs. 5, 6, and 22 of the English statute of frauds relative to the revocation of wills, passed in 1676; for the common law as to such revocations was abrogated by that statute.

The English statute was doubtless the basis and model of our statute, directly or indirectly; and the proviso in the latter, we think, is to be regarded as merely explanatory of the preceding part of the section, prescribing the manner of express revocation. Practically, and in effect, it was an adoption, under then existing conditions, of such implied revocations as had been introduced and established by the English courts, contrary to the plain meaning of the English statute, and solely through the usurpation of legislative power.

But the English courts did not go the length of establishing a rule that revocation might be shown by any change

of circumstances affording satisfactory evidence of the testator's revoking intention, but stopped far short of it, and restricted its application to a few exceptional cases, as to which it was held the statute did not apply. Hence, there is no tenable ground for holding that any causes of revocation were intended by our legislature to be embraced in the proviso to the act of 1822, aside from the existing exceptions established by the English courts upon supposed equitable considerations; and much less can it be held that any alteration was effected or intended by the revision of 1842, making the proviso a separate section, and slightly changing its phraseology. And as strongly tending to show that the purpose of the legislature was such as has been indicated, and that such has been the universal understanding of the bar of this State, it is a significant fact that no litigation has arisen as to the legislative intent, or the meaning of the language used in its expression, during the more than sixty years which have elapsed since the statute was first enacted.

No new cause of revocation being introduced by the statute, the true inquiry is, whether the facts of this case bring it within any of the exceptions upon the subject of implied revocation recognized by the English courts after the adoption of the statute of 1676, which were quite limited in number, and reasonably well defined and understood at the time our statute was enacted.

The causes assigned upon this point as ground of revocation are—subsequent changes in the circumstances of the deceased, his family, and estate. They are, substantially, the death of his wife and his son Franklin, both of whom were legatees; his second marriage, but without issue; the alienation of the larger portion of his estate; and its nearly threefold increase in value through natural causes and judicious investments.

But the total revocation cannot be implied from the death of the wife and the son: "the death of a devisee is a contingency always in view." (Shaw, C. J., in *Warner v. Beach*, 4 Gray, 162, 164.) "I know of no case," said Denman, C. J., in *Doe v. Edlin* (4 Ad. & E. 586), "where it has been held

that the removal of an object of affection and bounty by death has been taken to be an implied revocation of a will, and in my opinion it does not operate so." (And see *Fellows v. Allen*, *supra*.)

Nor can it be implied from the testator's remarriage, because the indispensable common-law requisite of the subsequent birth of a child is lacking. (1 Jar. Wills [5th Am. ed.], 272; 1 Redf. Wills, 293; Parsons Wills, *59; Worthington Wills, *528.) "This principle of law is incontrovertibly established." (4 Kent Com. 522.) And in this connection it should also be borne in mind that the rule never applied, except in cases where the wife and after-born children, the new objects of duty, were wholly unprovided for in the will, and where there was an entire disposition of the whole estate to their exclusion and prejudice; therefore, inasmuch as the widow and children of a testator, not provided for in a will, are, under our statutes, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded no longer exists; and so the rule itself has become inoperative and obsolete in this jurisdiction.

The inquiry thus becomes restricted to the effect of the changes in the testator's property—the phrase, "circumstances of the testator," &c., relating to new family ties, and not to changes in property. (4 Kent Com. 521, and authorities generally.)

But if it were apparent, as it certainly is not, that in the case of a testator an entire revocation by legal implication resulted, either before or after the statute of 1676, from any change whatever of condition or circumstances except that of a subsequent marriage and child, it is the undoubted general rule that a partial revocation only produces what is inaptly and inaccurately termed a revocation *pro tanto*, instead of an ademption of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not, however, by reason of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do, either by a con-

veyance, or by a new will or codicil. (See *Fellows v. Allen*, *supra*; *Carter v. Thomas*, 4 Greenl. 341, 343, 344; *Graves v. Sheldon*, 2 D. Chip. [Vt.] 71, 75; *Blandin v. Blandin*, 9 Vt. 210, 211; *Hawes v. Humphrey*, 9 Pick. 350; *Terry v. Edminster*, Ib. 355, n.; *Webster v. Webster*, 105 Mass. 538, 542; *Balliet's Appeal*, 14 Penn. St. 451; *Brush v. Brush*, 11 Ohio, 287; *Floyd v. Floyd*, 7 B. Mon. 290; *In re Nan Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Warren v. Taylor*, 56 Iowa, 182; *Wells v. Wells*, 35 Miss. 638; *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 417; 4 Dane Abr. 576, 577; Lovelass Wills, 358; 1 Redf. Wills, 335; Parsons Wills, 63.) "Conveying a part of the estate upon which the will would otherwise operate, indicates a change of purpose in the testator as to that part; but suffering the will to remain uncanceled, evinces that his intention is unchanged with respect to other property bequeathed or devised therein." (Weston, J., in *Carter v. Thomas*, *supra*, 344.)

The remaining circumstance, that of the increase of the estate, upon obvious considerations of public policy, has no weight; and to this effect is the great preponderance of authority. (*Warner v. Beach*, *Webster v. Webster*, *Graves v. Sheldon*, *Blandin v. Blandin*, *Balliet's Appeal*, *supra*; *Brush v. Wilkins*, 4 Johns. Ch. 507, 518, 519; *Wogan v. Small*, 11 Serg. & R. 141, 145; *Vandemark v. Vandemark*, 26 Barb. 416; *Verdier v. Verdier*, 8 Rich. Law (S. C.), 135.) "A merely general change in the testator's circumstances, as it regards the amount and relative value of his property, will not in general, if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncanceled, does, in effect, reaffirm it from day to day, until the termination of his conscious existence." (1 Redf. Wills, 298.)

The conclusion then is, that the subsequent changes in the circumstances of the testator, his family and estate, do not imply a revocation of his will. To effect a revocation, both the English and New Hampshire statutes require certain specified things, which are lacking in this case, to be done, and not merely contemplated, or even actually intended to be done. It is true that at an early day the English common-law courts

fell into the error of exercising legislative power, and materially amending the statute of 1676 by enlarging its specific methods of revocation so as to include revocations founded upon new family ties and obligations on the part of the testator arising from subsequent marriage, issue, and leaving wife and child without provision, and that, inasmuch as our statute must be regarded as a substantial re-enactment of that statute in the sense in which it had been interpreted by the English courts anterior to 1822, full effect must be given to their decisions, although plain encroachments upon legislative power; yet no rule was expressly established, and none can be inferred from the decisions, that makes it our duty to trespass still further upon the legislative domain, and so far judicially repeal the statute as to hold that the present case does not come within the purview of its fourteenth section. Even the English courts had come to a halt prior to 1822, and refused to extend the rule as to implied revocations beyond the precedents; and so have the American courts quite uniformly. (See *Doe v. Barford*, 4 M. & S. 10; Tilghman, C. J., in *Wogan v. Small*, *supra*, and authorities generally.)

The rule for which the appellee contends is, that a revocation may be proved or disproved by any circumstantial evidence showing the testator's intention; but the precedents do not support the contention. On the contrary, after a most thorough examination of the cases reported before the enactment of the New Hampshire statute, it was unanimously held, in *Marston v. Roe* (8 Ad. & E. 14), by the fourteen judges sitting in the cause, that implied revocation takes place in consequence of a rule or principle of law independently altogether of any question of intention; and there is no reason to suppose that the legislature of 1822 took a different view of the reported cases. If their purpose was to make intention, of itself, a ground of revocation, and thus inevitably incite litigation and "produce infinite uncertainty and delay in the settlement of estates," the presumption is that the statute would have been drawn accordingly. Even *Johnston v. Johnston* (1 Phillim. 447), upon which great stress has been laid by the appellees, while holding the subsequent birth of a portionless child to be

an indispensable requisite which would effect a revocation when aided by other circumstances, and a subsequent marriage not to be an essential requisite, does not hold that the revoking intent may be inferred from a general change of circumstances simply, but makes the controlling principle rest upon new moral obligations and family ties arising after the making of the will, and thus limits its application to cases of subsequent marriage or birth in which the wife or child would otherwise be left without provision for support. This case, however, is not relevant, the will being one of personalty only, and the decision being made by an ecclesiastical court unencumbered by statute provisions; and if it were relevant, its governing principle when applied to this case would be fatal to the appellees, for the reason that no child was born to the testator subsequently to the execution of his will. This being so, it is of no practical consequence here whether the doctrine of implied revocation rests upon the fact of a changed intention, as held in *Johnston v. Johnston*, or takes place in consequence of a rule or principle of law founded on a tacit condition annexed to the will itself when made, independently altogether of any question of intention, as held in *Marston v. Roe*; for the application of either principle to the facts of this case leaves the will unrevoked, because they fail to bring it within any of the exceptions introduced by the ecclesiastical or common-law courts.

But in respect of intention, there is another consideration which may properly be adverted to. If the circumstantial evidence appearing in the case were competent in law and sufficient in fact to show a change of intention on the part of the testator as to his final disposition of his property, it would not appear that his intention would be less defeated by disallowing this will than by allowing it. The only issue is, testacy or intestacy. To this issue the inquiry as to the testator's intention is limited; and whatever testamentary change he may have thought of making, he had no thought of dying intestate and leaving his property to be disposed of by the statutory rule of descent and distribution. There is no authorized conjecture that if the alternative of intestacy or the unaltered will

had been presented to him, he would have preferred the former rather than the latter. Hence, if all the circumstantial evidence were admissible, and if it proved all the appellee claims, the question it would present would be, not how the testator's intent could be carried into effect, but how it should be defeated. The choice would be restricted to two modes of violation, one testate and the other intestate; and the former, supported by the written and uncanceled evidence which the law regards as the best, would prevail over the latter, which would be sustained by no proof, competent or incompetent, and by no presumption of law or fact. The testator not intending to die intestate, the decree of disallowance for which the appellee contends would be an intestate reversal of a testamentary purpose. "But Gen. Hoitt intended to change his will." Suppose he did: the change could not now be made. The intended alteration (if there was one) is not known, and the altering power has ceased.

The proffered oral declarations of the testator, to the effect that he understood the will was revoked, were rightly rejected. The mere understanding of a testator cannot revoke his will, for legal requirements cannot be thus abrogated; nor can his oral declarations, for wills cannot be revoked by parol; nor, upon the great weight of authority, are such declarations evidence, unless they accompany some act of revocation, and thereby become a part of the *res gestæ*. (*Jackson v. Kniffen*, 2 Johns. 31; *Dan v. Brown*, 4 Cow. 483; *Clark v. Smith*, 34 Barb. 140; *Waterman v. Whitney*, 11 N. Y. 157; *Randall v. Beatty*, 31 N. J. Eq. 643; *Lewis v. Lewis*, 2 Watts & S. 455; *Hargroves v. Redd*, 43 Ga. 142, 160; *Gay v. Gay*, 60 Iowa, 415; *Rodgers v. Rodgers*, 6 Heisk. [Tenn.] 489; *Smith v. Fenner*, 1 Gall. 170; *Doe v. Palmer*, 16 Ad. & E. 747; 2 Gr. Ev. [9th ed.] § 690; Abb. Tr. Ev. 124; 2 Stark. Ev. [3d ed.] 1286; 1 Redf. Wills, 331.)

Such declarations also were not competent upon the testator's intention not to pass by his will after-acquired real estate. If a contrary intent is inferable from the will itself, it cannot be disproved by extrinsic evidence. If it is not thus

inferable, and may be ascertained by the weight of competent evidence, his declarations are not a part of such evidence.

Decree of the Probate Court reversed. Will allowed.

ALLEN, J., did not sit: the others concurred.

Implied Revocation.—An implied revocation is a deduction of law from established facts. *Sneed v. Ewing*, 5 J. J. Marsh. 460.

It has been held that this implication of revocation may be rebutted by circumstances, and that the declarations of the testator in his last sickness are admissible for this purpose. *Yerby v. Yerby*, 3 Call. 334. But the weight of authority seems to be to the contrary. See cases cited in the leading case.

It is well settled that the Statute of Frauds, and the statutes in America which follow its phraseology, providing that no devise shall be revoked but by the testator cancelling, &c. (29 Charles II, c. 3, § 6), only apply "to acts of direct and express revocation, and that a will may be revoked by implication or inference of law by various circumstances not within the purview of the statute." *Garrett v. Dabney*, 27 Miss. 335.

From this interpretation of the statutes we have the doctrine of implied revocation. Implied revocation is of two sorts—an implication from a supposed change of the intention of the testator as manifested by marriage, or marriage and issue, or by the birth of a child, and as manifested by an attempted conveyance of the estate devised; and an implication arising from the necessity of the case by an alteration in the estate or valid alienation thereof.

For example, at common law, the marriage of a woman acted as an absolute revocation of her will. *Cotter v. Layer*, 2 P. Wms. 624; *Doe v. Staple*, 2 T. Ray. 695.

And the will of a man was revoked by a marriage from which there was issue, these circumstances producing such a change in the testator's situation as to lead to the presumption that he could not intend a disposition of property previously made to continue in force. 1 *Jarman on Wills*, 122, 123; *Christopher v. Christopher*, Dick. 445.

So, too, under the old law, revocation was implied from an effort on the part of the testator to convey the estate previously devised. This was called revocation by "void conveyances."

And *ex necessitate rei* a valid conveyance of the property devised effected a revocation, and even a momentary interruption of the testator's seizin produced a like effect. *Burgoine v. Fox*, 1 Atk. 575; see *Revocation by Alteration of Estate*, *infra*.

But the courts have not gone so far as to lay down the rule that revo-

cation may be implied from *any* change of circumstances affording satisfactory evidence of the testator's revoking intention. On the contrary, implied revocation takes place in consequence of a rule or principle of law independently altogether of the actual intention of any particular testator. *Marston v. Roe*, 8 Ad. & El. 14. *Contra*, *Yerby v. Yerby*, 8 Call 334.

Thus, as stated in the text, a total revocation can not be implied from the death of the legatees or devisees, nor from the alienation of the larger portion of the estate which was specifically disposed of by the will.

"Conveying a part of the estate upon which the will would otherwise operate indicates a change of purpose in the testator as to that part, but suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property bequeathed or devised therein." *Carter v. Thomas*, 4 Greenl. 341; and cases cited *supra*.

Neither is a will revoked by implication from a change of the testator's circumstances as regard the amount and relative value of his property, as stated in the text.

Revocation can not be implied by law from the death of the testator's wife, and of one of his children, leaving issue; nor from the birth of another child contemplated in the will; nor from forty years of insanity, beginning soon after the making of the will, and continuing until his death; nor from a four-fold increase in the value of his property, so as greatly to change the proportion between the specific legacies given to some of the children and the shares of other children who were made residuary legatees. *Warner v. Beach*, 4 Gray, 162.

On various other pretexts efforts have been made to establish the revocation of wills, and in these cases it has been decided that the insertion of a clause (*Dixon's Appeal*, 55 Penn. St. 224; *Wright v. Wright*, 5 Ind. 389; cf. *Wickoff's Appeal*, 15 Penn. St. 281), or the changing of a date will not effect the revocation of a will. *Dixon's Appeal*, 55 Penn. St. 224; *Overall v. Overall*, Litt. Sel. Cas. 501. Nor will the changing of an executor, nor the striking out of a devise necessitate the republication of a will. *Wells v. Wells*, 4 T. B. Mon. 152; *Ex parte Brown*, 1 B. Mon. 56. Neither is a will revoked by the refusal of one who has it in keeping to deliver it to the testator for alteration. *Leaycraft v. Simmons*, 3 Bradf. N. Y. 35. Nor by the addition of an unexecuted codicil. *Heise v. Heise*, 31 Penn. St. 246. Nor by the discovery of the existence of a child. *Ordish v. McDermott*, 2 Redf. 460, 463. Cf. *Sheperd v. Sheperd*, 5 Term. Rep. 51; *Brush v. Wilkins*, 4 Johns. Ch. 506.

A will is not made invalid because one of the subscribing witnesses subsequently became the husband of the testatrix, it being sufficient that he was a creditable witness at the time of the execution. *Fellows v. Allen*, 60 N. H. 439, 440; s. c., 49 Am. Rep. 328; *Lord v. Lord*, 58 N. H. 7. Nor by the fact that one or more of the witnesses died before probate.

Fellows v. Allen, 60 N. H. 489, 440; *Dean v. Dean*, 27 Vt. 746. Nor by the death of the mother of the testatrix, and the change in her family relations by the marriage of her sister. *Fellows v. Allen*, 60 N. H. 439, 441. Nor by the destruction of a will made in favor of the testator. *Id.* 439, 441. Nor by the will being found among worthless papers. *Id.*

Under the statute in Vermont, revocation can not be implied merely from a change in the circumstances of the testator, and no revocation will be implied except *ex necessitate rei* as from subsequent alienation inconsistent with the will, and then only *pro tanto*. *Graves v. Sheldon*, 2 D. Chip. 74; *Parkhill v. Parkhill*, Brayt. 289.

And when a statute in its general language embraces all kinds of revocation, both by acts of the testator and by implication of law, giving special instances in which particularly implied revocations are allowed, it is to the exclusion of all methods of revocation not especially enumerated. *Ordish v. McDermott*, 2 Redf. 460, 468; *Langdon v. Astor*, 16 N. Y. 9; *DeLafield v. Parish*, 25 N. Y. 9.

Under the New York statute, for example, only marriage or the birth of children operates to revoke a will by implication. *Parish v. Parish*, 42 Barb. 274.

And, therefore, it has been said, the intention of a testator that a subsequent gift or advancement shall operate as a satisfaction of a legacy cannot be presumed, for this would be a partial revocation of the will by implication from circumstances not specified in the statute. *Langdon v. Astor*, 3 Duer, 477.

Implied Revocation from Marriage and Issue.—At common law, marriage with birth of issue revoked the will of a man. *Langford v. Little*, 2 Jo. & Lat. 633; *In re Shirley*, 2 Curt. 657; overruling dictum in *Hobbs v. Knight*, 1 Curt. 768; *Christopher v. Christopher*, Dick. 445; *Sprague v. Stone*, Amb. 721; *Overbury v. Overbury*, 2 Show. 242; *Lugg v. Lugg*, 2 Salk. 592; *Brown v. Thompson*, 1 Eq. Ab. 413, pl. 15; *Eyre v. Eyre*, 1 P. Wms. 304, note; cf. *Parsons v. Lanoe*, 1 Ves. 192; *Gibbons v. Caunt*, 4 Ves. 848. And it was immaterial whether the child were born before or after the death of the testator. *Doe v. Lancashire*, 5 T. Ray. 49; *Israell v. Rodon*, 2 Moo. P. C. C. 51; *Matson v. Magrath*, 1 Rob. 680; a. c., 6 No. Cas. 709; s. c., 7 Jur. 350. Or whether it outlived or died before its father. *Helyar v. Helyar*, cit. 1 Phillim. 413; *Sullivan v. Sullivan*, cit. 1 Id. 843; *Emerson v. Boville*, 1 Id. 842. Contra, *Wright v. Netherwood*, 2 Salk. 598; a. c., 2 Phillim. 266. Cf. 1 Jarman on Wills, 127.

It has been thought that the subsequent birth of children by an existing marriage, the death of their mother and the second marriage of their father would revoke a will in the same manner that marriage and the birth of a child therefrom would revoke a will previously executed, the order of the events making no difference. 1 Jarman on Wills, 124; *Gibbons v. Caunt*, 4 Ves. 848.

But at common law marriage and issue did not revoke a will which did not dispose of the whole estate. Dicta in *Brady v. Cubit*, Dougl. 81; *Kenebel v. Scrafton*, 2 East, 541; *Marston v. Fox*, 8 Ad. & Ell. 57. Nor when the wife and child had been *both* provided for in the will, or in a settlement made *prior* to the execution thereof. *Kenebel v. Scrafton*, 2 East, 530. *Marston v. Fox*, 8 Add. & Ell. 14; s. c., 2 Nev. & P. 504 (seeming to overrule *Brown v. Thompson*, 1 Eq. Ab. 418, pl. 15); *Israell v. Rodon*, 2 Moo. P. C. C. 51 (overruling *Talbot v. Talbot*, 1 Hagg. 705; *Johnston v. Wells*, 2 Hagg. 561, and, it would seem, *Ex parte Ilchester*, 7 Ves. 348). *Of. Matson v. Magrath*, 1 Rob. 680; s. c., 6 No. Cas. 709; s. c., 13 Jur. 350; *In re Cadywold*, 1 Sw. & Tr. 84; s. c., 27 L. J. Prob. 38, doubted in 1 *Jarman on Wills* (4th Eng. ed.), 124, note.

But at the present day the matter is generally regulated by statute. Under the Victorian statute, 1 Victoria, c. 26, § 18, marriage alone without birth of issue, is made a revocation of the wills of both husband and wife, and no declaration in or out of the will can obviate this result. 1 *Jarman on Wills*, 128.

"Every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the statute of distributions." 1 Victoria, c. 26, § 18.

Under similar statutes marriage acts as a revocation of the will of a man in the Virginias and Georgia and Kentucky and North Carolina, also in Rhode Island, Illinois, and Connecticut. In the last named State, however, if provision be made for the contingency, marriage does not revoke a will. And in the Virginias, and Kentucky, and North Carolina, this provision of the statutes does not apply to a will made in exercise of a collateral power of appointment (*Stimson's Am. Stat. L.* [Jan. 1, 1886] § 2876, B; *Byrd v. Surles*, 77 N. C. 435; *Morgan v. Ireland*, 1 Idaho [N. S.], 786); when in default of such appointment, the estate would not pass to the heir, personal representative, or next of kin. *Phaup v. Wooldrige*, 12 Gratt. 332.

In Georgia it has been held that a testator may rebut the presumption of revocation raised by marriage and the birth of a child by a declaration in writing executed with the same formalities required for a will. *Deupree v. Deupree*, 45 Ga. 415; cf. *Miller v. Phillips*, 9 R. I. 141.

Revocation of a will by marriage under the statute of Rhode Island is presumptive only, and evidence of a contrary intent is admissible. *Wheeler v. Wheeler*, 1 R. I. 864.

In Illinois, under the statute, marriage acts *per se* as a revocation of a prior will. *McAnulty v. McAnulty* (Illinois, 1887), 11 N. E. Rep. 897;

Duryea v. Duryea, 85 Ill. 41. *Cf.* cases cited in note to *Id.* 11 N. E. Rep. 397; Ill. Rev. Stat. c. 39, § 10; *contra*, *In re Tuller*, 79 Ill. 99.

And in the same State it has been held, under a statute making husband and wife heir to one another when there are no children nor descendants, that marriage acts as a revocation of a will made prior thereto making no provision therefor, and disposing of the entire estate, unless there are facts subsequent to the marriage which show an intention that the will shall stand. *Tyler v. Tyler*, 19 Ill. 151.

In South Carolina subsequent marriage and the survival of the widow or children of the marriage acts as a revocation of a will, unless expressed upon its face to have been made in contemplation of marriage and containing provision for future wife and children. *Stimson's Am. Stat. L.* (Jan. 1, 1886) § 2676, C.

The Connecticut statute is substantially similar. *Id.* § 2676, B, note 6.

And the survival of the widow revokes a will made prior to the marriage in Alabama, New York, California, Nevada, Washington Territory, Dakota, Montana, and Utah, unless provision for her have been made by marriage settlement or in the will, or she be mentioned in the will itself in such a manner as shows an intention to make no provision for her. *Stimson's Am. Stat. L.* (Jan. 1, 1886) § 2676, D.

Marriage without issue does not revoke a will in Texas. *Morgan v. Davenport*, 60 Tex. 280. *Cf.* *Tex. Dig.* (Paschal.) §§ 5363, 5364.

Nor, it would seem, in Indiana. *Bowers v. Bowers*, 58 Ind. 430.

In New York, from the facts of marriage and the birth of a child, the law presumes an intention on the part of a testator to revoke a will previously made disposing of the whole estate, where neither in the will nor otherwise has there been made any provision for the new relations. *Havens v. Van Den Burgh*, 1 Den. 27; *Brusk v. Wilkins*, 4 Johna. Ch. 505.

Implied Revocation from Marriage of Feme Sole.—Prior to the statute of 1 Victoria, c. 26, marriage acted as an absolute revocation of the will of a woman, and when the disabilities of coverture were removed by the death of her husband the will was not revived thereby. *Forse and Hembling's Case*, 4 Rep. 61; s. c., *And.* 181; *Cotter v. Layer*, 2 P. Wms. 624; *Doe v. Staple*, 2 T. Ray. 695; *Hodsden v. Lloyd*, 2 B. C. C. 533; *Long v. Aldred*, 3 Add. 48.

By that statute her marriage still has the same revoking effect. 1 Victoria, c. 26, § 18.

But even before its enactment the will of a woman made in execution of a power was not revoked by her marriage. *Logan v. Bell*, 1 C. B. 872; *cf.* *Douglas v. Cooper*, 8 My. & K. 878.

Nor was a will made under a power during the life of the husband revoked by his death. *Du Mourmelin v. Sheldon*, 19 Beav. 389; *Clough v. Clough*, 3 My. & K. 296; *Morwan v. Thompson*, 3 Hagg. 239.

But, of course, if the power was given to the wife "in case she dies in

the lifetime of her husband," and in case of her surviving, the property is given to her absolutely, a will made during coverture is inoperative if the wife survives, as the power never arose. 1 Jarman on Wills (4th Eng. ed.), 122, note, citing *Price v. Parker*, 16 Sim. 198; *Trimmell v. Fell*, 16 Beav. 537; *Willock v. Noble*, L. R. 7 H. L. 580.

And it will not even raise a case of election. *Id.*, citing *Blacklock v. Grindle*, L. R. 7 Eq. 215.

In this country a will by a *feme sole* is deemed revoked by her subsequent marriage under the statutes of the Virginias, Kentucky, and Missouri, in North Carolina, Georgia, Alabama, Arkansas, in Rhode Island, New York, Pennsylvania, Indiana, Illinois, in California, Oregon, Nevada, Dakota, and Montana. *Stimson's Am. Stat. L.* (Jan. 1, 1886) § 2676, A; *Phaup v. Wooldridge*, 14 Gratt. 382. *Cf.* *Blodgett v. Moore*, 141 Mass. 75.

In Massachusetts also, under a statute prescribing the modes of revoking a will and recognizing implied revocation "from subsequent change in the condition or circumstances of the testator," marriage will revoke the will of a woman. *Swan v. Hammond*, 138 Mass. 45; s. c., 52 Am. Rep. 255.

But under the Massachusetts act of 1783, ch. 24, repealing 12 William III, ch. 7, the marriage of a woman without issue was not a revocation of her will. *Church v. Croker*, 3 Mass. 17, 21.

In New York marriage is a revocation of a woman's will notwithstanding an ante-nuptial agreement whereby she retains full control of her property. *Lathrop v. Dunlop*, 6 Thomp. & C. 512; s. c., 4 Hun, 218.

And the New York acts of 1848, 1849, 1860, for the protection of the property of married women, did not by implication repeal the provision of the revised statutes that a will executed by an unmarried woman should be deemed revoked by her subsequent marriage. *Loomis v. Loomis*, 51 Barb. 257.

Nor are the provisions of a statute as to the revocation of a woman's will by her subsequent marriage abrogated by an act relieving married women from the disability which debarred them from making a will. *Brown v. Clark*, 77 N. Y. 369. *Cf.* *Fransen's Will*, 26 Penn. St. 202.

The will of a woman, revoked by marriage, is not revived by her husband's death under the laws of Pennsylvania, California, Nevada, Dakota, and Montana. *Stimson's Am. Stat. L.* (Jan. 1, 1886) § 2676, A.

In Connecticut, if provision be made for the contingency, marriage does not revoke a woman's will. *Stimson's Am. Stat. L.* (Jan. 1, 1886) § 2676, A, note b, citing *Conn. Ann. Laws of 1875*, c. 84.

In Ohio the will of a woman is not revoked by marriage. *Ohio Rev. Stat.* (1880) § 5958.

The same has been held to be the rule in New Hampshire and New Jersey. *Fellows v. Allen*, 60 N. H. 439; s. c., 49 Am. Rep. 328; *Webb v. Jones*, 36 N. J. Eq. 163. *Cf.* *In re Tuller*, 79 Ill. 99.

And it has been held in Michigan that where a *feme covert* has the power to make a will as if she were unmarried, the will of a single woman is not revoked by marriage alone. *Noyes v. Southworth*, 55 Mich. 173; s. c., 54 Am. Rep. 359.

A will revoked by the marriage of the testatrix may be declared void whenever the facts appear, even in a decree on final accounting. *Davis' Estate*, 1 Tuck. 107.

Implied Revocation from Birth of a Child.—The general rule is that the birth of a child unprovided for in its father's will works a revocation thereof. *Alden v. Johnson*, 63 Iowa, 124; *Sneed v. Ewing*, 5 J. J. Marsh. 460; *Hart v. Hart*, 70 Ga. 764; *Squire's Estate*, 11 Phila. 110; *Hughes v. Hughes*, 37 Ind. 183; *Hackett v. Stephens*, 3 La. Ann. 271; *Lewis v. Lewis*, 8 La. Ann. 378; *Wilcox v. Rootes*, 1 Wash. 140; *Ash v. Ash*, 9 Ohio St. 383; *Tomlinson v. Tomlinson*, 1 Ashm. 324; *Bloomer v. Bloomer*, 2 Bradf. 339; *Coates v. Hughes*, 3 Binn. 498.

And although the rule is founded upon the supposed change of intention on the part of the testator, he cannot prevent its operation by parol declaration of an opposite intent. *Marston v. Roe*, 8 Ad. & Ell. 14; *Goodtitle v. Otway*, 2 H. Bl. 522; *Doe v. Lancashire*, 5 T. Ray. 61; *Kenebel v. Scrafton*, 5 Ves. 663; s. c. 2 East, 530; *Israell v. Rodon*, 2 Moo. P. C. C. 51; *Matson v. Magrath*, 1 Rob. 680; s. c. 6 No. Cas. 709; 13 Jur. 350. *Cf. Stimson's Am. Stat. L. (Jan. 1, 1886) § 2676 C.*; *Gibbons v. Caunt*, 4 Ves. 848; *Hall v. Hill*, 1 D. & War. 114, 115. *Contra*, *Brady v. Cubit*, Dougl. 31; *Gibbens v. Cross*, 2 Add. 455; *Fox v. Marston*, 1 Curt. 494.

While a posthumous child for whom no provision has been made continues to live the will must be deemed revoked and the property must descend according to the statute. *Morse v. Morse*, 43 Ind. 365.

The repeal of the Iowa statute providing for an abatement of legacies to provide for a child born after the will, has operated to restore the common-law rule that the birth of a child operated as a revocation of a will. *Negus v. Negus*, 46 Iowa, 487; *Fallon v. Chidester*, 46 Iowa, 588.

And under a statute in that State which admits to a share in the inheritance an illegitimate child which has been recognized by its father, the birth and recognition of such a child will act as a revocation, as though it had been legitimate. *Milburn v. Milburn*, 60 Iowa, 411.

The general rule that the birth of a child after the making of a will acts as a revocation of it, would seem to be a part of the common law of America, independent of the statutes. *McCullom v. McKenzie*, 26 Iowa, 510.

There are, however, certain statutory enactments on the subject.

In Louisiana, Georgia, Indiana, in the Virginias and Kentucky, and in Texas, Mississippi, Delaware, Connecticut and New Jersey the statutes by various provisions protect the interests of children born

after the making of a will—providing generally, that in the absence of some mention in the will or of some provision for them in the will itself or otherwise, the testament shall be void. The statutes should be consulted for the details. *Cf.* Stimson's Am. Stat. L. (Jan. 1, 1886) § 2676, E and F.

But where provision is made for the children of a marriage, the birth of a child does not revoke the will. *Savage v. Mears*, 2 Rob. 570.

And the birth of a child which would not have been benefited by the revocation of a will did not under the common law work a revocation thereof. *Sheath v. York*, 1 Ves. & B. 390. *Cf.* *Holloway v. Clarke*, 1 Phillim. 829; *Walker v. Walker*, 2 Curt. 854; *Gibbons v. Caunt*, 4 Ves. 849; *Wright v. Netherwood*, 2 Salk. 593, note; 1 Jarman on Wills, 126.

Implied Revocation from Alteration of Estate.—General View of the Statutes.—"Under the old law it was essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will and that he should continue so seized without interruption until his decease. If, therefore, a testator subsequently to his will, by deed aliened lands which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void." 1 Jarman on Wills (4th Eng. ed.), 147.

And the devise of a freehold lease, which was renewed by the testator after making his will could not take effect under it. 1 Id. 147, *q. v. et seq.*

But the revocation of devises by an alteration of estate is placed on an entirely new footing by the statute 1 Victoria, c. 26, which provides, "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances" (1 Victoria, c. 26, § 19; N. C. Code [1883], § 2178); and that no conveyance of real or personal property previously devised shall act as a revocation as to the estate or interest therein which the testator might have the right to dispose of by will at the time of his death. Id. § 28.

In several of the united American States similar statutes are to be found, providing in substance that no conveyance or alteration of estate which does not wholly divest the testator of all interest in the property mentioned in the will shall prevent the operation of the instrument with respect to that which the testator may have power to dispose of at the time of his death. Such provisions are contained in the statutes of the Virginias and Kentucky, and in North Carolina, New York, Ohio, Indiana, Kansas, California, Dakota, Montana and Utah. Stimson's Am. Stat. Law (Jan. 1, 1886), § 2810.

Under the statutes of Alabama and Indiana the conveyance of property previously devised and taking back a new estate therein, will not

effect a revocation unless the will or conveyance show an intention on the testator's part so to do. Ala. Code (1876), § 2289; Ind. Rev. Stat. (1881) § 2565; Stimson's Am. Stat. Law (Jan. 1, 1886) § 2810, B.

But the conveyance of an estate or interest previously devised or bequeathed is deemed a revocation thereof, if so expressed in the conveyance under the statutes of New York, Ohio, Indiana, Kansas, California, Dakota, Montana and Utah; and whether so expressed or not, under these statutes it will act as a revocation if the provisions of the conveyance are totally inconsistent with the devise or bequest, except where the conveyance has been made to depend upon a condition or contingency which has failed. Stimson's Am. Stat. L. (Jan. 1, 1886) § 2810, A.

In Louisiana subsequent conveyance will act as a revocation although the sale or donation be null and the thing have returned to the possession of the testator. Stimson's Am. Stat. Law (Jan. 1, 1886), § 2810, A. 3; La. Civ. Code (1875), § 1696.

It is provided by statute in some of the American States that an agreement to convey property previously devised or bequeathed does not revoke the gift, but that the property shall pass to the devisees subject to such remedies for enforcement of specific performance as might have been had against the heirs or next of kin. This is the case in Missouri and Arkansas, and in New York, Ohio, Kansas, California, Oregon, Nevada, Washington Territory, Dakota, Montana and Utah. This is the rule, also, in Alabama and Indiana, if any part of the consideration remains unpaid at the testator's death, unless it appear from the contract agreeing to convey that it was intended to work a revocation. And the statutes of the last two States provide that the purchase-money in such cases when recovered by the executor shall be paid to the devisees. Stimson's Am. Stat. Law (Jan. 1, 1886), § 2810, C.

In Alabama, making a contract for the sale of land shall not revoke a previous devise in the absence of any writing evincing an intention on the part of the testator to revoke it, unless the whole of the purchase-money has been paid. Ala. Code (1876), § 2287; *Powell v. Powell*, 30 Ala. 697.

Accordingly, where one made a sale and conveyance of a part of the lands which he had previously devised and a greater part of the price remained unpaid, it did not act as a revocation; and oral declarations of the deceased tending to show an intent to revoke the devise at some future time or a present oral revocation cannot be admitted as evidence. *Slaughter v. Stephens* (Ala. 1887), 2 So. Rep. 145.

A charge or incumbrance upon real or personal estate does not work a revocation of a will under the statutes of Missouri, Arkansas, New York, Indiana, Kansas, California, Oregon, Washington Territory, Dakota, Montana and Utah; but the devises or bequests take effect subject to the incumbrance. This is the case in Alabama, also, unless it appear in the

will or in the instrument creating the charge that the testator intended it to act as a revocation. Stimson's Am. Stat. L. (Jan. 1, 1886) § 2810, B.

Under these modern statutes "it is now scarcely possible for any residuum of interest remaining in the testator at his death to escape from the previous devise." 1 Jarman on Wills (4th Am. ed.), 164, citing *Lowndes v. Norton*, 38 L. J. Ch. 588. *Cf. Prater v. Whittle*, 16 S. C. 40.

But of course now, as before, a conveyance and sale of the whole of the testator's title and interest in property devised is a revocation of that devise. *Arnald v. Arnald*, 1 B. C. C. 401.

A conveyance in fee is a revocation of a devise, although the grantor reserve to himself a ground rent. *Skerrett v. Burd*, 1 Whart. 246.

And a deed conveying all the property bequeathed is a revocation of the whole will. *Epps v. Dean*, 28 Ga. 583; *Bowen v. Johnson*, 6 Ind. 110.

A covenant to convey is a revocation of the equitable interest of the devisee in the property, leaving him nothing but the bare legal title (*Donohoo v. Lea*, 1 Swan, 119; *Farrar v. Winterton*, 5 Beav. 1; *Moore v. Raisbeck*, 12 Sim. 123; *Hall v. Bray*, 1 N. J. L. 212), with which he has a right to the rent until the conveyance is completed. *Watts v. Watts*, L. R. 17 Eq. 217.

A subsequent conveyance of a portion of the property devised is a revocation *pro tanto* only. *Balliet's Appeal*, 14 Penn. St. 451; *Brown v. Thorndike*, 15 Pick. 388.

Thus, where property previously devised was conveyed on trust to pay debts, it was a revocation *pro tanto* only, and so much as remained after the payment of the debts went to the devisees. *Livingston v. Livingston*, 3 Johns. Ch. 148. *Cf. Jones v. Hartley*, 2 Whart. 103.

So, too, a will disposing of both real and personal property is not revoked as to the latter by a sale of the former. *Warren v. Taylor*, 56 Iowa, 182.

Neither will the execution of a deed conveying a portion of his estate to his wife revoke a previous will by which the testator's whole estate was given to her. *Clingan v. Mitchelltree*, 81 Penn. St. 25.

Incurring debts that swallow up all the estate given to the testator's own children, but leaving intact a legacy to a bastard grandchild, does not, of itself, revoke the will. *Wogan v. Small*, 11 Serg. & R. 148.

No revocation is to be implied from the testator's acquiring a larger interest than when he made the will. If, after the execution of his will a testator purchases land which would be included in the general description of the land devised by the will, it does not operate as a revocation either wholly or partially. *Blandin v. Blandin*, 9 Vt. 210.

And where a testator makes a specific bequest of property which he holds upon a lease, and afterwards acquires a fee in the same, it has

been ruled that the entire interest possessed by the testator at his death passed under the bequest. *Cox v. Bennett*, L. R. 6 Eq. 422.

In Delaware, a will of lands held in common is not revoked by the testator acquiring the whole in severalty; but the after-acquired portion of the estate does not pass. *Duffel v. Burton*, 4 Harr. 290.

A mortgage on part of the property to the sole beneficiary under the will, although made by the testator in the belief that the will was invalid and with the intention of substituting it for the will, is not a revocation under the statute. *Stubbs v. Houston*, 33 Ala. 555.

HODGIN vs. TOLER.

[70 Iowa, 21.]

A POWER GIVEN TO AN EXECUTOR TO SELL LAND DOES NOT PASS TO AN ADMINISTRATOR CUM TESTAMENTO ANNEKO.

A power to sell land given by the testator to an executor does not, in the absence of statutory provision, devolve upon an administrator *cum testamento annexo*, unless the intention that it should do so clearly appears from the will itself.

APPEAL from a judgment of the Taylor Circuit Court.
The opinion states the case.

J. M. St. John and *G. B. Haddock*, for appellant.

H. H. Artz and *Lyman Evans*, for appellees.

SEEVERS, J. (Omitting a question of practice.) The facts are that the plaintiff is the widow of Robert Hodgin, who died in August, 1880, in the State of Ohio, where he and the plaintiff at that time resided. Robert Hodgin, at the time of his death, owned real and personal property in the State of Ohio, and also certain real estate which is the subject of controversy in this action. The deceased executed a will, which

was duly admitted to probate in the State of Ohio, and he thereby devised to the plaintiff, after the payment of his debts, all his "property of every description, real, personal, and mixed," for and during her natural life. Provision was made in the will for repairing and adorning a lot in a cemetery, and for a family monument. Money was set aside for these purposes. Item four of the will provides: "After the above bequests are fully carried out, I give and bequeath the balance and residue of the estate to certain persons;" and item five is in these words: "I do hereby nominate and appoint Ben H. Steel and George Starbuck, or the survivor of them, executors of this, my last will and testament, hereby empowering them, or the survivor of them, to sell at public or private sale all my real estate, of every description, upon such terms of credit or otherwise as they may think proper, and deeds to purchasers to execute, acknowledge, and deliver in fee simple." Starbuck failed to qualify as executor, but Steel did, and thereafter resigned the trust, and thereupon Samuel Berry was, by the proper Probate Court of Ohio, appointed "administrator of the estate of said Robert Hodgin with the will annexed, and he duly qualified as such. In November, 1881, Berry caused said will to be admitted to probate in Taylor county, Iowa, and on the eighth day of December, 1881, said Berry, as such administrator, conveyed the real estate (in said county belonging to the deceased) to Johnson, Franklin & Co. for a sufficient consideration, and the referee found that there was no fraudulent intent upon the part of any one connected with such purchase and sale. It is insisted that, under the provisions of the will, Berry had not the power and authority to make the sale and conveyance he did, and this is the question to be determined.

Counsel for the appellant insist that trust and confidence were reposed in the persons named as executors by the testator, and that the administrator was not invested therewith, and that he did not, by devolution, have the power to sell the real estate, unless it became necessary to do so to pay debts or legacies, and that in such case the sale could only be made in pursuance of authority granted by the proper court of this

State. It is apparently conceded that the executors could sell at any time during the existence of the life estate and convey a fee simple title. It may be doubtful whether, under a proper construction of the will, this is true; but, as the point is not made by counsel, we shall not stop to discuss it. That personal trust and confidence were reposed by the testator in the persons named by him as executors, we have no doubt. Such trust was not reposed in them as executors, but as individuals, for they, or the survivor of them, were empowered to sell. A large discretion was given them, for the will does not direct that a sale should be made. This was to be determined by the persons named as executors. It was left to their discretion to determine when, for what reason, and the terms and conditions upon which, it should be made. There is no pretense that the sale and conveyance of the land were made for any purpose connected with the due administration of the estate. The only authority is that given by the will. If, under the power therein conferred, the administrator could not lawfully make the sale and conveyance, then it is invalid. In this State an administrator has no control of the real estate, unless it becomes necessary to sell the same for the payment of debts, and then he must obtain authority to make the sale from the proper court.

In Williams on Executors (vol. 1), in a note on page 724, it is said: "As a general rule, a power to sell land, given by a will to an executor, will not devolve upon an administrator with the will annexed." In support of this rule many authorities are cited, the majority of which we have examined; and we have no hesitation in affirming that the rule as stated above is sustained by the great and decided weight of authority, in the absence of a statute whereby such rule is changed. In fact, subject to this qualification, we have been unable to find any adjudged case holding otherwise. The leading cases in this country are *Conklin v. Egerton's Adm'r* (21 Wend. 430), and *Tainter v. Clark* (13 Metc. 220). In both of these cases, and particularly in the first, the whole subject is exhaustively discussed, and the conclusion reached above stated. The following cases sustain such rule: *Ross v. Barclay* (18 Pa. St.

179), *Brown v. Hobson* (3 A. K. Marsh. 380), *Lucas v. Price* (4 Ala. 697), *Vardeman v. Ross* (36 Tex. 111), *Hall v. Irwin* (2 Gilman, 176), *Nicoll v. Scott* (99 Ill. 259), *Wills v. Cowper* (2 Ohio, 124). In *Ingle v. Jones* (9 Wall. 486) it is said: "Such a power never passes by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power in place of the executor appointed by the will. In view of these authorities, we do not deem it necessary to restate the reasons upon which the rule is founded, deeming it sufficient to say that the rule and reasons upon which it is based seem to us to be correct on principle, and therefore we are content to follow the authorities cited.

Counsel for the appellees, however, insist that, under the statute and decisions of this court, a different rule must prevail, and they cite, as sustaining their position, *Shawhan v. Loffer* (24 Iowa, 230), and *Lees v. Wetmore* (58 Iowa, 170). In the first case no such question was before the court, and whatever is said in the opinion which counsel seems to believe be arson the question under consideration, is used by way of argument. The last case is distinguishable upon two grounds. The first is that the will directed the real estate to be sold, and authority to sell was conferred by the will upon the executors as such. The second ground is that the executor or administrator appointed in this State applied for and obtained authority from the proper Probate Court to make the sale in accordance with and for the purpose of carrying out the provisions of the will. The statutes relied upon are the following sections of the Code:

"Sec. 2347. If a person appointed executor refuses to accept the trust, or neglects to appear within ten days after his appointment, and give bond as hereinafter prescribed, or if an executor remove his residence from the State, a vacancy will be deemed to have occurred.

"Sec. 2348. In case of vacancy, letters of administration with the will annexed may be granted to some other person, or, if there be another person competent to act, he may be allowed to proceed by himself in administering the estate.

"Sec. 2349. The substitution of other executors shall occasion no delay in administering the estate."

It is evident, we think, that these sections simply refer to and have a bearing on matters which ordinarily occur in the administration of all estates. No power whatever is conferred upon the substituted executor or administrator. Thereunder he obtains simply the power of every other administrator who is appointed in the first instance. It cannot be said, we think, that the foregoing sections of the Code devolve on the substituted administrator a personal trust which the testator delegated to the person named by him as executor. When *Conklin v. Egerton's Adm'r*, before cited, was decided, there was in force the following statute: "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators with such will annexed shall have the rights and powers, and be subject to the same duties, as if they had been named in such will." And it was held that this statute had reference only to the personal estate, inventories, distribution, and remedies. This conclusion was questioned by some of the members of the Court of Errors, but it has never been overruled. (*Roome v. Philips*, 27 N. Y. 357 [363]; *Egerton's Adm'r v. Conklin*, 25 Wend. 224; and *Brown v. Armistead*, 6 Rand. 594.) *Shields v. Smith* (8 Bush, 601), and *Dilworth v. Rice* (48 Mo. 124), are based on statutes materially different.

Counsel also rely on and cite section 2351 of the Code. This section relates to the probate of foreign wills, and the powers of executors thereunder, but no power is thereby conferred upon an administrator with the will annexed.

We are of the opinion that the court erred in refusing the relief asked by the plaintiff. The judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with this opinion; or the plaintiff may have a decree, if she so desires, in this court.

Reversed.

ESTATE OF LYON.

[70 Iowa, 375.]

WIDOW'S SHARE OF PERSONALTY.

A widow is entitled to one-third of her husband's personal estate, notwithstanding that more than two-thirds of it is given to the children by will.

APPEAL from an order of the Johnson Circuit Court. The opinion states the case.

Baker & Ball and *W. W. Morsman*, for appellant.

Boal & Jackson, for appellees.

SEEVERS, J. The first question we are invited to consider is, whether "the widow is entitled to receive one-third of the personal estate of her deceased husband, notwithstanding the provisions of a will giving more than two-thirds of the same to his children." Counsel for the appellant frankly concede that this question was determined adversely to the appellant by a majority of the court in *Ward v. Wolf* (56 Iowa, 465), and that this case was followed in *Linton v. Crosby* (61 Iowa, 401); but they, with much force and vigor, contend that these decisions are erroneous, and contrary to both the letter and spirit of the statute. The writer is directed to say that the court adheres to the rule established in the cited cases, and that it is not deemed necessary to restate the reasons or advance others in support of the rule. It therefore is unnecessary to consider the question whether the widow was allowed more than she was entitled to by the court; for, as we understand counsel, such question only becomes material in case the court overruled the cases above cited.

The will was executed on the thirty-first day of August, 1876, and the testator died after the sixteenth day of April, 1880. After making provision for the widow, and specific devises of real estate to each of his children, and a watch to his grandson, the testator devised all of the residue of his

estate to his three children, Louis E. Lyon, Estelle Morsman, and Ella L. Warfield; the same to be equally divided between them. During the lifetime of Mr. Lyon, and from February 17, 1875, to April 16, 1880, as appellees claim, he made advancements to the appellant, or charged her with the sum of \$14,525, intending thereby to create the relation of debtor and creditor, or that the same should be regarded as advancements to be deducted from her share of his estate. Of this sum \$9,725 was so advanced or charged prior to the execution of the will. The appellant claims that this last named sum was a gift, or that, whatever it may be designated, it cannot be charged to her and deducted from the share she would otherwise be entitled to under the will. The fact is that the testator gave the appellant but \$100, and that was after the execution of the will, unless what was given her as a wedding present can be so regarded. In the view we take of the case, it is not necessary to further refer to the gift made appellant on her marriage. All the balance of the money or property, amounting in value to \$14,425, was given to the appellant's husband, and was charged to him by the testator in his books.

Counsel for the appellant concede that the money and property given to her and her husband after the execution of the will should be regarded as an ademption of the prior legacy, and that, from the amount to which the appellant is entitled, the amount so given should be deducted; but it is contended that the amount so given prior to the execution of the will cannot be brought into hotchpot, nor can such prior gift be regarded as an ademption of a legacy given in a will subsequently executed. The claim being that, conceding that the money and property given appellant's husband should be regarded as advancements to appellant, and the same brought into hotchpot if there was no will, such rule has no application to a case where there is a will under which the appellant is a residuary legatee; that the rule applies to intestate, or possibly to partially intestate, estates only. This position, we think, must be sustained. The authorities so hold, and our attention has not been called to one which holds otherwise. (See *Snelgrove v. Snelgrove*, 4 Dessaus. Eq. 274; *Richmond v. Vanhook*, 3

Ired. Eq. 581; *Brewton v. Brewton*, 30 Ga. 416; *Loring v. Blake*, 106 Mass. 592; 1 Pom. Eq., § 570.)

The primary object in all cases is to ascertain the intention of the testator. The will must stand and speak for itself, unless it has been revoked or changed in the manner provided by statute. As the will gives the appellant an equal share of the estate, after the specific legacies have been satisfied, and no mention is made in the will of any advancements having been made to her, or that she is to be charged therewith, the presumption must obtain that such was not the testator's intent. This, it seems to us, must be so; and that it quite clearly appears that it was not the intent of the testator that appellant should be charged with money given her husband prior to the execution of the will, for the reason that he clearly intended that she should receive the one third part of the residue of his estate; and it is clear she would not receive this share if the so-called advancements are to be charged to her.

The money and property given the appellant's husband was either a gift, an advancement, or a debt. We do not think it was the latter; for there is nothing tending to show that it was so intended, unless the simple charge in the books makes it a debt due from the appellant to the testator. But it was not charged to the appellant, and it could not have been collected of her. Suppose the estate had proved to be insolvent, can it be successfully claimed that a recovery could have been obtained against the appellant for money given her husband? We feel sure that this inquiry must be answered in the negative. It, therefore, must have been either an advancement or a gift. If it was the latter, then it was fully executed prior to the execution of the will, and the testator could not recall it without the consent of the appellant. If it should be regarded as an advancement, can a prior advancement be an ademption of a subsequent legacy or gift by will? Courts of equity incline strongly in favor of equality, and against double portion. But it is difficult to say that the testator intended the legacy as an ademption, or to be in lieu of the prior advancement, for the reason that the residue of an estate is always uncertain. He could not know with any reasonable

degree of certainty what it would be. The costs of administration were unknown. Losses might occur between the time the will was executed and the death of the testator, or the estate might increase in value. That a subsequent gift may be intended as in lieu of, or as a satisfaction of, a prior promise or legacy, we can readily conceive. But, even in such case, we understand the rule to be that the subsequent gift must be of the same class or kind as the provision made in a prior will. Therefore a devise in a will of \$500 may be regarded as satisfied by the subsequent payment of the same amount of money to the devisee as a marriage portion, if so intended; and it has been held that such intention may be shown by parol. (*Hartop v. Whitmore*, 1 P. Wms. 681.) The case at bar is materially different, but counsel for the appellee contend that parol evidence is admissible in this case to show that the testator intended the devise to be different from what the will on its face appears to be; that is, that appellant was not to have one-third of the residue of the estate, but that she was to be charged with a prior advancement. Now, it seems to us that this, in substance and effect, is a revocation or alteration of the provisions of the will, which are clear, certain, and definite, without a compliance with the requirements of the statute. (*Zeiter v. Zeiter*, 4 Watts, 212.)

The rule as to the admissibility of parol evidence in cases of this character is thus stated in 3 Greenl. Ev., § 366: "That parol evidence is not admissible to prove that the party did not mean what he has said [that is, that the appellant should receive the one-third of the residue of his estate], but that, when the law presumes that he did not so mean, parol evidence is admissible to prove that he did, by rebutting that presumption; it not being conclusive, but disputable."

It was established by parol evidence that, a short time prior to the testator's death, he asked appellant if she knew how much "money he had given her." She replied: "Yes; it was over \$18,000." After his death, the executor forwarded to her a copy of the account, and she and her husband indorsed thereon, "Correct," signed their names thereto, and returned it. But it is apparent, we think, that the appellant did not

then believe it was to be made the basis of a charge against her. At most, however, it amounts to a statement that she had received the amount stated in the account of her father. It, however, clearly appears that she did receive but \$100, and the residue was given to her husband, and was charged by the testator to him. Now, what is an advancement? It is nothing more or less than an irrevocable gift made by a parent to a child in anticipation of such child's future share of the estate. It may be, when the testator made the charge to the appellant's husband, that he intended the money so charged and given as an advancement to appellant, but we think such evidence is inadmissible to establish such fact, because it directly contradicts the provisions of the will. It will not do to say that the will creates a presumption merely which may be contradicted by parol. The will constitutes written evidence of the testator's intent, which can only be overcome by some writing executed as provided by Code, §§ 2329, 2330. For the reasons stated, we think the court erred in charging the appellant with \$9,725, and deducting the same from the share she is entitled to under the will.

Modified and affirmed.

MATTER OF PAGE.

[118 Illinois, 576.]

PROOF OF THE CONTENTS OF A LOST WILL.

The contents of a lost or destroyed will may be proved by the testimony of a single witness.

APPEAL from a judgment of the Appellate Court of the First District.

George W. Smith, for appellant.

A. B. Jenks and *Wallace Smith*, for appellee.

SCHOLFIELD, J. Joseph P. Maxwell died in Cook county on the 22d day of September, A. D. 1876, leaving surviving him, a widow, Sarah J. Maxwell, and several children. No will being discovered at the time of his death, administration of his estate was granted to Benjamin V. Page and Sarah J. Maxwell. On the 26th day of October, A. D. 1881, Sarah J. Maxwell having discovered, as she alleged, within a few days of that time, that Joseph P. Maxwell made a last will and testament on or about the 1st day of August, A. D. 1876, which he left unrevoked at the time of his death, presented her petition to the Probate Court of Cook county, that the same might be probated. The Probate Court made an order admitting the alleged will to probate, and that order was affirmed, on appeal to the Circuit Court of Cook county. An appeal was prosecuted from the order of the Circuit Court to the Appellate Court for the First District, and that court affirmed the judgment of the Circuit Court. The case is now before us by appeal from the last named judgment.

It is provided in our Statute of Wills (Rev. Stat. 1874, p. 1101), in section 2, that "all wills, testaments and codicils . . . shall be reduced to writing, and signed by the testator or testatrix, . . . and attested, in the presence of the testator or testatrix, by two or more credible witnesses." And section 6 provides, that in "all cases where any one or more of the witnesses to any will, testament or codicil, as aforesaid, shall die, or remove to parts unknown to the parties concerned, so that his or her testimony cannot be procured, it shall be lawful for the County Court, or other court having jurisdiction of the subject-matter, to admit proof of the handwriting of any such deceased or absent witness, as aforesaid, and such other secondary evidence as is admissible in courts of justice to establish written contracts generally, in similar cases, and may thereupon proceed to record the same, as though such will, testament or codicil had been proved by such subscribing witness or witnesses in his or their proper person." This, it will be observed, is not restricted to cases where the will is actually produced before the court. The language applies to all cases wherein a witness to the will or codicil dies ; and the

same reason that would exclude it from lost or destroyed wills would exclude the language requiring wills to be witnessed by two or more witnesses, from such wills. But all wills are to be attested in the same way, and the only difference between wills that are produced in open court, and those that have been lost or destroyed, is in the mode of proving their contents. The will that is produced shows what its contents are, but secondary proof must be made of the contents of a lost or destroyed will.

That the contents of a lost or destroyed will may be proved by the testimony of a single witness, is settled, in England, since the decision in the great case of *Sugden v. Lord St. Leonards*, 17 English (Moak's notes), 453. And like ruling has obtained in this country. (*Dickey v. Malechi*, 6 Mo. 177.) And in this country the ruling in general is, that a will may be established by one, only, of the attesting witnesses, if he can testify to a compliance with the statute relating to its execution. (*Welch v. Welch*, 2 T. B. Mon. 83; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Vickery*, 1 Wend. 431; *Lambert v. Hooper's Exrs.*, 29 Gratt. 61; *Jackson v. Legrange*, 19 Johns. 386; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Thornton v. Thornton*, 39 Vt. 122. See, also, to like effect, in principle, *Doran v. Mullen*, 78 Ill. 342.) And the fact that the will is destroyed or lost makes no difference in this respect, as will be seen by *Dickey v. Malechi* (*supra*) and *Dan v. Brown* (*supra*). *Sugden v. St. Leonards* (*supra*) also holds that declarations, written or oral, made by a testator after the execution of his will, are, in the event of its loss, admissible, not only to prove that it has not been cancelled, but also as secondary evidence of its contents. It has been held otherwise in New York, but this, in our opinion, is the more reasonable ruling. Cockburn, C. J., in speaking of this question, among other things, said: "In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed, *animo revocandi*, when the will, having remained in the custody of the testator, is no longer forthcoming. Thus, if a testator were to say, 'When I am

dead, you will find my will in such a place,' or 'I have left my estate of Blackacre to my son John,' or 'I have left £5,000 to my daughter Mary,' such, or similar declarations, would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time they were made." And he then goes on to show, that, upon like principle, such declarations are also admissible to prove the contents of the will, discriminating *Doe v. Palmer*, and overruling *Quick v. Quick*. To like effect, see, also, *Hope's Appeal*, 48 Mich. 518.

The evidence, here, is complete as to the due formal execution of the will. Mr. Tourtelotte, a prominent member of the bar of the city of Chicago, testified, that about the 1st day of August, A. D. 1876, at the request of Joseph P. Maxwell, he drew his will for him; that Maxwell then signed it in the office of Eldridge & Tourtelotte, in the presence of the witness and H. P. Fulton; that he (Tourtelotte) and Fulton witnessed Maxwell sign the will, at Maxwell's request; that the witnesses then, in Maxwell's presence, and in the presence of each other, signed their names to the will, as witnesses thereto; that no one else was present at the time; that Maxwell was then of sound mind and memory; that after the will was signed by Maxwell and the witnesses, Maxwell took it away with him; that H. P. Fulton died in the spring of 1877. Tourtelotte gives a copy of the will. By it, Maxwell devised his entire estate to his wife, adding this language: "To have and to use the same, and dispose of the same as she may deem best, having full confidence that she will deal justly by the children."

The presumption arising from the non-discovery of the will since the death of the testator, is, that he revoked and cancelled it, and the question is, whether that presumption is overcome by the evidence, here. Tourtelotte testified, that some time after he drew the will—a few weeks before the death of the testator—he and Maxwell talked about the will, and Maxwell said he then had it in a safe; that the talk was in regard to whether Tourtelotte or Maxwell should keep the will, and Maxwell said, "he had it in a safe place, among his

other papers." Philena Maxwell, a daughter of the testator, says, in substance, that about the last of August or first of September, A. D. 1876, her father and her mother and her sister were at Cleveland, and they returned within two weeks of the 22d of September, and he was then sick, and he remained sick until he died, on the 22d of September; that he never went to his place of business, nor left the house or his bed, after he returned; that after his return, and while he was thus on his death-bed, she heard conversation between him and her mother, in which he said that he expected to die, and that there was a will, and everything would be left to her mother, at her discretion, for the good of the children. Thomas Maxwell, a son of the testator, says: "After father was taken sick—his last sickness—he did not leave the house; he was sick about two weeks; just before his sickness he was away; . . . he came home sick; . . . during father's last sickness I heard him say that there was a will; . . . he was talking to my mother; . . . that was a few days before he died; . . . I don't remember exactly what he said, in words, but what he meant to convey was, that he left a will, and left her provided for, and the will was in her favor." Frank E. Maxwell, another son of the testator, says: "About four weeks before my father died he was going out of town. He said if anything happened to him—that he should die—there was a will left at a factory of his."

No one contradicts either of these witnesses. If they have any interest in the event of the suit, they testify against it. No circumstance tending to affect their veracity is in evidence.

The will, it will be observed, was made only some six or seven weeks before the testator's death. There is not a circumstance in evidence tending to show subsequent dissatisfaction on the part of the testator with the will, or any attempt or wish to cancel or change it, but there are, on the contrary, these repeated declarations, after it was made, from time to time, up to within a few days of his death, recognizing its continued existence. Why should he have spoken falsely in this respect—and this, too, in the face of impending death,

realized by him? Not the shadow of an excuse is shown. We think the conclusion must be, that the testator did not, contrary to all these assertions, intend to revoke and cancel the will. There is, it is true, the circumstance that he sent his son for a paper, while he was lying sick, which he did not return to the safe; but this son could read and says that he, at one time, saw among the papers an envelope indorsed "Will," and he does not pretend it was that paper which he carried to his father.

It is useless to discuss the facts further. Some circumstances have been pressed in argument, such as the fact that a previous memorandum for a will was not destroyed, and that the testator retained the custody of the will instead of leaving it with Tourtelotte, which we do not deem of any significance. In our opinion they are just as consistent with the truth of the repeated declarations of the testator as with the view claimed by appellant. It is not indispensable that we should determine what became of the will. It is enough that, in our opinion, it was not revoked or cancelled by the testator.

The judgment is affirmed.

Judgment affirmed.

YARDLEY vs. CUTHBERTSON.

[108 Pennsylvania St., 395.]

UNDUE INFLUENCE.—DEVISAVIT VEL NON.—EVIDENCE.—EXPERT TESTIMONY.

Where the testator's faculties, at the time of making a codicil to his will, are impaired by age and disease, and the codicil changes the will essentially, and in favor of the confidential adviser of the testator, the burden of proof is upon the proponent to show affirmatively the state of the testator's mind, and that he knew, approximately at least, the condition of his estate and the effect of the codicil.

ERROR to the Court of Common Pleas of Philadelphia County. The facts appear in the opinion.

George Junkin, for plaintiffs in error.

W. W. Porter, A. Sydney Biddle, H. J. McCarthy, George W. Biddle and *William A. Porter*, for defendants in error.

GREEN, J. The first assignment of error relates to the form of the issue. The precept from the Orphans' Court directed an issue to be formed to determine—

“*First.* Whether the said certain writing dated December 2d, A. D. 1876, is a codicil to the will of said John L. Neill, deceased.

“*Second.* Whether at the time of the making of said alleged codicil the said John L. Neill was of sound disposing mind, memory and understanding.

“*Third.* Whether the alleged codicil was produced by undue influence, fraud, imposition or duress.”

Under this order pleadings were filed consisting of a narr. with three counts, each one charging a conversation and a wager upon one of the three foregoing several matters covered by the precept, a plea denying each of the assertions contained in the narr. and tendering issue upon all, and a similar joining issue as to all. The executors were made plaintiffs in the issue and certain of the legatees whose legacies were changed by the codicil were made defendants. It is the executors who object to the form of the issue and not the legatees. They do not complain that they were made parties and plaintiffs, nor do they indicate how they were harmed by the character of the pleading. They contend that the pleadings should have been so framed that the defendants should have alleged the undue influence as a defense, and thus relieved the plaintiffs from the necessity of alleging and proving a negative, and they also argue that the question whether the paper in controversy was a codicil is a mixed question of law and fact, which should not have been left to a jury. Whatever might

be our views abstractly upon these matters, it would not be proper for us to reverse the case on these grounds, because the original petition in the Orphans' Court prayed for an issue in this very form, and that court having refused the issue, we reversed the decree and directed "that the issue prayed for in the court below be granted." Having done this, the court below declined to change the form of the issue which the Orphans' Court, in obedience to our order, had sent over to the Common Pleas for trial, and it would certainly not be correct for us now to reverse the Common Pleas for doing precisely what we directed to be done by the Orphans' Court. In *Dotts v. Felzer* (9 Barr, 88) we said, "It is the business of the court which awards a feigned issue, to name the parties to it and prescribe the form of it; and as this was done by the Register's Court, the Common Pleas had no power to dispute it." When the case was first before us (1 Out., 163), on appeal from the Orphans' Court, no question was raised as to the form of the issue, and our attention was not called to the subject. Even if we would have made a different order, had the matter been discussed before us, yet as we did, in fact, make the order awarding the very issue which has been tried, and the parties have upon the faith of it incurred the very great expense and trouble involved in so protracted a trial, we could not with any propriety reverse the proceedings and order another trial upon such a ground. Application was made to us, after the second decision of the Orphans' Court in which the issue was ordered, asking us to change the issue, but we declined to entertain it.

But if the question were an open one, so long as the executors are plaintiffs in the issue it is difficult to see how they are injured by the form adopted in this case. It is in substance the issue *devisavit vel non* which has almost universally prevailed in this Commonwealth during the whole period of our jurisprudence. That kind of issue is founded upon the idea that the executors assert and uphold the will, and that it is their business to establish it if it is questioned, and, being charged with this duty, they should be made parties and plaintiffs in the contest. We have never yet formally decided

that an issue *devisavit vel non* is illegal, and in view of the long continued and unquestioned practice regarding them, we could not do so now. We are, however, of opinion that they are altogether erroneous and ought to be abrogated. They are in our judgment contrary to the principles of pleading and not warranted by the law which authorizes them when they emanate from the Register's Court formerly, or the Orphans' Court now. That law, Act of 15th March, 1882, § 41, *Purd. Dig.* 1256, pl. 22, permits only the granting of issues to try disputed questions of fact. We have many times held that issues for such purposes must designate specific facts, and mere consistency requires that we should adhere to the same rule when the disputed facts affect the validity of a will. We deny to executors the right to employ and pay counsel out of the estate in their hands for the trial of such issues, and yet we sustain their right to be parties to them. The issue *devisavit vel non* is not an issue to try any fact. The question is one of mixed law and fact, proper only to be determined by a court after the pure facts have all been found. It belonged to the Register's Court formerly and the Orphans' Court now, after the certificate from the Common Pleas has come back showing how the disputed facts have been found. The law presumes sanity and freedom from undue influence as to all wills, and that presumption prevails until the contrary is alleged and proven. He who makes such allegations must prove them, and therefore the real burden of proof is on him. Strictly, therefore, he should be the plaintiff in the issue. As the executors, as such, have no interest in the estate to be distributed, they have no business in the issue and ought not to be parties to it. The parties actually interested in sustaining the will ought to be defendants in the issue. With the contestant as plaintiff and the legatees as defendants, and an issue to try specific disputed facts only, a properly constituted litigation will be established consistent in, and with, itself, conforming to the rules of pleading and evidence, in proper subservience to the statute under sanction, and by force of which it is conducted, and in all things satisfactory to the requirements of the legal and judicial mind. These views, however, are *obiter dicta* only, the question is not dis-

tinently before us, and they are expressed because the occasion has suggested them, and in order that the attention of the profession may be attracted to the subject. In some parts of the State the issues in will cases have been framed and tried in the manner here suggested for many years and with entire satisfaction to the bench and bar as we understand. We said in *Bitner v. Bitner* (15 P. F. S. 347): "The looseness with which feigned issues are so often formed is a source of frequent regret, which we had occasion to notice last year in a case from Luzerne county. This case is another instance. The only issue presented by the pleadings is whether the writing was the last will and testament of Christian Bitner. But this presented no issue of fact. It might not have been his last will for various reasons of law and fact, as want of due execution, revocation, duress, insanity, &c. Such an issue withdraws the will from the exclusive jurisdiction of the register or Register's Court, and commits it to the Common Pleas, which has no jurisdiction except to try issues of fact only sent to it for a trial by jury." But these remarks also were *obiter dicta* only, as no assignment of error raised the question, and the form of the issue was not before us. It is satisfactory to notice that in framing the issue in the present case some progress is made in the right direction. It does distinctly set forth two specific facts upon which issue is joined and the cause tried. It is to be hoped the time may yet come when these issues will be ordered, framed and tried upon sound principles of pleading, and in accordance with the numerous decisions of this court, which determine the character of issues in other cases.

The objection that this issue required the plaintiffs to prove a negative, in respect to the allegation of undue influence, would not be serious if it were well taken, but it is not well taken. In substance it is an allegation that the codicil was made by the testator of his own free will and is no more negative in its character than the averment of sanity. The anomaly comes from making the wrong persons plaintiffs. If the plaintiffs are the persons who contest the codicil they, properly and affirmatively, allege insanity and undue influence

and must prove whatever they allege. But if the persons who support the codicil are made plaintiffs and undertake to describe the issues, they do so by two affirmative allegations of sanity and free will, or two negative ones denying insanity and denying undue influence. In this respect the two averments are essentially alike. The first assignment of error is not sustained.

Second, third and fourth assignments. There is a slight difference between the first of these three questions and the other two. But it is a difference apparent only and not real. The last two of the questions, covered by the third and fourth assignments, expressly assume the truth of the facts upon which the expert opinion is asked, while the first assumes it tacitly. The latter propounds a question upon the *sufficiency* of the whole of the plaintiff's testimony as presented in the evidence, to enable the witness to determine the question of mental capacity. The truthfulness of the testimony is necessarily assumed, its sufficiency only being inquired of. Any other theory makes it meaningless and ridiculous. Of course it could not be sufficient if there is the slightest question as to its truth.

The discussion of these three assignments is therefore practically the same. The question common to all, when succinctly stated is, can the opinion of an expert witness be asked and taken upon a mass of facts, actually proved on the trial of a case, upon the assumption that the whole is true. There is no question that if all of the same facts are grouped together in a hypothetical question the opinion may be taken. There is some contrariety of decision, though not much, on this subject, but our own cases and the weight of other authority appear to establish the admissibility of the evidence. In *Pidcock v. Potter* (18 P. F. S. 342) the rule is thus stated: "Subscribing witnesses of course testify to the state of the testator's mind, and in addition to the facts give their opinion. The same is the case with medical men who, as experts, may give their opinion upon hypothetical cases or upon the facts proved. (1 Greenleaf's Ev. § 440.) In Pennsylvania it has always been the rule that after a non-professional witness has stated the

facts upon which his opinion is founded, he is permitted to state his opinion as to the sanity or insanity of the testator." In *Forbes v. Caruthers* (3 Yeates, 527) we said: "Thus a physician who has not seen the particular patient may, after hearing the evidence of others, be called to prove, on his oath, the general effects of a particular disease, and its probable consequences in the particular case."

In *Detweiler v. Groff* (10 Barr, 376) we said: "In questions of science, skill and trade or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence (1 Green. Ev. § 440); their opinions are confined to their judgment on the facts proved."

In *Olmsted & Bailey v. Gere* (4 Out. 127), which was an action of case for malpractice, we reversed the court below for rejecting the following question put to a physician as an expert: Q. From the testimony you have heard as to the mode in which this limb was treated by Dr. Bailey, and from the results you find upon the limb, was there any unskillful management on his part?—and held that an opinion derived from both sources was competent.

None of these cases presents the very question we are considering, but they proceed upon the idea, and affirm the doctrine, that an expert witness may be asked his opinion upon facts proved on the trial and heard by or known to the witness.

In *Dexter v. Hall* (15 Wall. 9), however, a decision was made which seems to cover every aspect of the question now before us. The matter involved was the sanity of one who had executed a power of attorney. Depositions had been taken on both sides, some tending to show sanity and others insanity. All of the depositions were read in evidence and were also read by a physician who was examined as an expert. He was then asked the following question: "From the facts stated in these depositions, and the symptoms stated, what, in your opinion, was the state of Hall's mind Dec. 27th, 1852, as to sanity or insanity?" The plaintiffs objected to the witness expressing any opinion founded on the testimony adduced on

both sides, and the court sustained the objection, permitting the witness, however, to give his opinion upon the testimony adduced by the plaintiffs. The Supreme Court said that the only assignment "which has any plausibility, and which needs particular notice, is that which complains of the refusal of the court to permit a medical witness to give his opinion respecting the sanity of John Hall at the time when he signed the power of attorney, basing his opinion upon the facts and symptoms stated in the depositions read at the trial. The witness was, however, allowed to give his opinion upon the testimony adduced by the plaintiffs. The record does not show fully what were the facts stated in the deposition, nor whether they were established by uncontradicted evidence. It may be, therefore, that by the form in which the question was put the witness was required to give his opinion upon facts, but to ascertain and determine what the facts were. This of course was inadmissible. The rule is as laid down in Greenleaf's Evidence (§ 440): "If the facts are doubtful and remain to be found by the jury it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated." The court proceeded to say that as the answer was favorable to the defendant he was not injured by the decision of the court refusing permission to let the witness answer upon all the testimony, and he could not complain, but it is plainly to be implied and the case is so reported, that the action of the court below was approved.

It seems to us that this is the true distinction upon which the question should be determined. The witness cannot be asked to state his opinion upon the whole case, because that necessarily includes the determination of what are the facts and this can only be done by the jury. But if either the facts are stated hypothetically in one question, or if the whole of the testimony delivered by one of the parties or by certain of the witnesses for one party is made known to the expert either by his reading it or hearing it, and he is then asked his opinion upon it assuming it to be true, in either case the opinion is sought upon an assumed state of facts, and may therefore be

given. We can see no difference between the two modes of putting the question to the expert, except in the manner in which the facts upon which he is to give his opinion are made known to him. In the one mode they are all repeated to him in the question and in the other he reads them or hears them testified to, but in both the essential requirements of assuming them to be true is enjoined. Thus the witness in either case determines none of the facts himself, and in both his opinion is based upon the assumption of their truth. The source of his information is different, but the information itself is the same, generically, in both cases. Many cases have been ruled upon this distinction.

Thus in a very elaborate opinion in the case of *Gilman v. Town of Strafford* (50 Verm. 723), where the questions propounded were upon the facts stated in depositions, the court said: "Where an expert hears or reads the evidence, there is no reason why he may not form as correct a judgment upon such evidence, assuming it to be true, as if the same evidence was submitted to him in the form of hypothetical questions, and it would seem to be an idle and useless ceremony to require evidence with which he is already familiar to be repeated to him in that form."

In *Negroes, Jerry et al. v. Jeremiah Townshend* (9 Md. 145), the court said: "The question propounded to the witness was not his opinion upon the evidence submitted. By such a question it would be left to the witness to determine what testimony he would believe and what he would reject, and the degree of weight to be attached to each item of testimony submitted. But the question was, 'upon the hypothesis that the testimony given by the witness in this case was all true,' then what would be the witness' opinion? By this interrogatory as thus put the witness is not permitted to weigh the testimony, but is required to assume it all to be true as stated. It is virtually, as we have said, putting a hypothetical state of the case to the witness upon which his opinion is to be given."

In *Wright v. Hardy* (22 Wisc. 348) the action was for negligently performing the amputation of a limb. An expert

witness was asked: "Suppose his (a witness whose testimony the expert had heard) statement relative to the amputation and his subsequent treatment to be truthful, was or was not the amputation well performed?" The court below rejected the question. The Supreme Court said: "For ourselves we can see no reasonable objection to it. The sole object of all rules upon the subject is that the questions shall be so framed as not to require the expert to give an opinion upon the credibility of the testimony and the truth of the facts, which are purely questions for the jury. The questions asked required no expression of opinion as to credibility of the testimony or truth of the facts deposed to by witness Knapp. . . . It follows, therefore, that the court erred in rejecting the questions."

In *Getchell v. Hill* (21 Minn. 464) the issue was as to the treatment of a broken arm. The question was: "Having heard the testimony in this case and assuming it to be true, what in your opinion, as a surgeon, was the necessity . . . of the treatment?" The court said: "This form of question is not obnoxious to the objection that it calls on the witness to decide any question of fact for the purpose of basing the opinion upon it. It is in effect putting to the witness a hypothetical case which is admitted to be proper. In strictness, the question should state the hypothetical case. We think, however, that the trial court may in its discretion, as a matter of convenience, permit the hypothesis to be put to the witness by referring him to the testimony, if he has heard it, instead of requiring the counsel to recapitulate it."

In *Fenwick v. Bell* (1 Car. & Kir. 312) it was held that in an action of case for running down the plaintiff's ship, a nautical witness may be asked whether, having heard the evidence and admitting the facts proved by the plaintiff to be true, he is of opinion that the collision could have been avoided by proper care on the part of defendant's servants.

A similar form of question was permitted by Lord Ellenborough in *Beckwith v. Sydebotham*, 1 Campb. 116.

In *Commonwealth v. Rogers* (7 Metc. 500), Chief Justice Shaw, charging a jury in a homicide case where the defense

was insanity, after defining the subject of expert testimony, said: "One caution in regard to this point is proper to give. Even where the medical or other professional witnesses have attended the whole trial and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate?" In *Hunt v. Lowell Gas Light Co.* (8 Allen, 170) the plaintiffs called three physicians who had heard the testimony on the part of the plaintiffs which was not conflicting, and asked each of them this question: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" The defendants objected to the question, but it was allowed, and, on error, the court, Chapman, J., said: "The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinion as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded. The question put in *Sills v. Brown* (9 C. & P. 601) was of this character and was rightly excluded. But where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of the fact. In the present case the question allowed to be put does not seem to us to require of the witnesses anything more than a scientific opinion, and we do not understand the answer to include anything more than this." Without enlarging this opinion by further extended citations,

it is sufficient to say that similar rulings were made in *Fairchild v. Bascomb*, 35 Verm. 398; *People v. Thurston*, 2 Parker's Crim. Rep. 133; *Kempsey v. McGinnis*, 21 Mich. 139; *State v. Lautenschlager*, 22 Minn. 521; *Rea v. Searle*, 1 M. & Rob. 75; *Heald v. Thing*, 45 Maine, 396; *McNaghten's Case*, 10 Clark & Finelly, 198; and in Ray's Medical Jurisprudence of Insanity (5th ed.), §§ 638-650, the same doctrine is stated and defended with elaborate argument and numerous citations. We have carefully examined the cases cited by the learned counsel for the plaintiffs in error and do not find that they materially conflict with the cases above referred to, or the doctrine they announce. Those of them which hold that an expert witness properly qualified cannot be asked whether in his opinion the alleged testator was mentally competent to make a will cannot be regarded as of any authority in this State where the opposite doctrine has always prevailed, and it is no longer an open question.

Those of them which relate to the question we are considering were, in the main, decided upon some special reason not in hostility with the cases above cited, as for instance because the question required the witness to pass upon all the testimony in the case, or to infer the facts or some of them, or the assumption of the truth of the facts to be considered was omitted, or the question was so framed as to require the witness to determine the credibility of the testimony or some part of it, or the testimony upon which he was to pronounce was in itself contradictory.

After a careful review of the whole subject we have reached the conclusion that the questions we are considering, not asking the witness to express an opinion upon the whole of the testimony, but only upon a defined portion of it, that testimony not being contradictory in itself, and its truthfulness being expressly assumed, the witness being first made acquainted with the whole of it upon which he was to pronounce, were competent questions which might be lawfully put and answered. It is scarcely necessary to say that there is nothing in the case of *Coyle v. The Commonwealth* (8 Out.

117) in conflict with these views. The second, third and fourth assignments are not sustained.

Fifth, sixth, seventh, eighth and ninth assignments. An examination of the record shows that the witnesses had been examined and fully testified in chief upon the subjects covered by the questions whose rejection is complained of in these assignments. At the very best their admission was subject to the discretion of the court below which we would not review. (*Young v. Edwards*, 22 P. F. S. 264; *Gaines v. Com.*, 14 Wr. 329; *Aiken v. Stewart*, 13 P. F. S. 33.)

Tenth assignment. We could not possibly sustain this assignment without reversing all that we have decided in *Boyd v. Boyd*, *Frew v. Clarke*, *Cuthbertson's Appeal*, and kindred cases on the subject of confidential advisers writing wills under which they take large benefits.

Eleventh assignment. The fourth point of the plaintiffs was as follows: "If the jury believe from the evidence that Mr. Neill was of sound mind when the codicil was made, and himself suggested or directed the alterations in his will which are contained in the codicil and the residuary clause contained therein, no presumption arises against the validity of the codicil because of the relation in which Mr. Yardley stood to Mr. Neill in the drawing and execution of the codicil." The answer of the court was as follows: "This point is affirmed, with this qualification, that it is always ground for suspicion where one holding confidential relations to a testator prepares for and directs the execution of a will under which he takes a considerable interest, and that the obligation rests on such confidential agent to show by clear and satisfactory proof that the testator fully understood the testamentary disposition of his property as it may be expressed in the will or codicil."

The error assigned is that the point should have been but was not affirmed absolutely and without the qualification.

There is no doubt that the point as expressed is sound and might have been affirmed without any qualification. But the question with which we have to deal is, was it error to add the qualification. The point was stated hypothetically, which

was the proper way of stating it, but there was highly controverted evidence as to the truth of the facts expressed in the hypothesis. The jury has found that Mr. Neill was not of sound mind when the codicil was made, and the only evidence of express direction was flatly contradicted by a witness having no interest in the disputed clause.

In the light of such a verdict we must assume there was evidence of mental unsoundness given to the jury and the record shows such to be the fact. It was entirely undisputed that the person who wrote the codicil was by its provisions made the legatee of almost four-fifths of the estate, when the will, written by the testator himself when he was thoroughly master of his faculties, contained no such provision nor anything at all approaching it, or similar to it. It was also the fact that the codicil reduced certain legacies given by the will from \$175,000 to \$35,000, and that nothing was said to the testator indicating what proportion of his estate would go to the scrivener under the codicil which the latter prepared. In these circumstances it cannot be said that there was any impropriety or unseemliness on the part of the learned judge who tried the cause, in annexing to the affirmative answer which he gave to the point, a suitable cautionary qualification.

It is common practice to do so, and in many cases it is desirable, and in some, necessary. Of course it is essential that the qualification shall, itself, be free of error. In the present case the only material inquiry is, was the matter stated in the qualification erroneous or sound in a legal sense. The weight of the argument for the plaintiffs in error is that the court charged in the qualification that although the facts supposed by the point created no presumption against the validity of the codicil, yet "Mr. Yardley must show by clear and satisfactory proof that the testator fully understood the testamentary disposition of his property, because it is ground for suspicion when Mr. Yardley prepared the codicil for Mr. Neill which gave him a considerable interest and directed its execution. Why a suspicion if under such circumstances there was no presumption against the validity of the codicil. Why *must* Mr. Yardley prove by clear and satisfactory evi-

dence that this entirely sound-minded man who 'suggested and directed the alterations' which gave Mr. Yardley 'the considerable interest' really understood the testamentary disposition he suggested or directed, if there was no presumption against the validity of the codicil made under such circumstances. The very foundation of the qualification thus made is the thought that the presumption is that the codicil is the will of Mr. Yardley and not the will of Mr. Neill and he must, therefore, by clear proof, overcome this presumption and show that Mr. Neill understood the whole thing and meant to give Mr. Yardley the considerable interest. Why must Mr. Yardley show all this? Because the law under the circumstances stated presumes that Mr. Yardley, as the confidential agent of Mr. Neill, controlled his mind. The law presumes the codicil invalid until Mr. Yardley, by due proof, rebuts the presumption. This is what the learned judge meant and told the jury. If the learned judge had really told the jury all this in answering the point, his language would have been amenable to the criticism made upon it. But he did not so tell them. The fallacy of the argument lies in overlooking the fact that while the point and the answer affirming it were in the concrete, the qualification was in the abstract only. The point applied a particular hypothesis directly to Mr. Neill and Mr. Yardley by name and this court affirmed. It said that if *Mr. Neill* was of sound mind and himself suggested or directed the alterations in the will, no presumption arose against Yardley on account of his relation to Neill. This was what the court affirmed. What the court added was a purely abstract proposition not applied to the individuals named or either of them. The point and answer were personal, the qualification was impersonal. Unless, therefore, the impersonal and abstract proposition contained in the qualification was erroneous there was no error in its utterance. What was that proposition? This—"That it is always a ground for suspicion where one holding confidential relation to a testator prepares and directs the execution of a will under which he takes a considerable interest." Is not this sound law? If it is not the writer has strangely misread the cases. The learned judge must be

treated with fairness. He had most abundantly presented the entire subject in his elaborate and exhaustive charge, and with so much satisfaction to counsel that not a single assignment of error is made to any part of the general charge. Here he must be judged by the very words he uttered and by nothing else. Arguments that he said what he did not say, or that he meant what his words do not necessarily import are not sufficient—they cannot persuade. The one fact declared in this sentence of the qualification is, that one holding confidential relations to a testator prepares and directs the execution of a will under which he takes a considerable interest, and the one inference from that fact which is expressed, is “that it is always a ground for suspicion.”

These words do not say that the fact stated created a presumption of invalidity against the will, they do not say even that it shifts the burden of proof. They say only that it is a ground of suspicion. Surely this is not error. If it is not a ground of suspicion it must be an indifferent fact, of no consequence in and of itself. But all the cases and text writers so pronounce it. The innate sense of morality and of right which underlies all law so declares it. Whether it is suspicious when associated with other facts depends upon what those facts are. But this particular language we are considering treats it by itself, without any association with other facts, and so regarded, it certainly expresses a legal truth. The remainder of the qualification declares “that the obligation rests upon such confidential agent to show by clear and satisfactory proof that the testator fully understood the testamentary disposition of his property as it may be expressed in the will or codicil.”

Undoubtedly this is correct. The confidential agent who wrote the will may discharge this obligation by showing that the testator was of sound mind, and himself directed the terms of the will, as was said in the plaintiff's fourth point, or he may show that the precise meaning and import of the gift to the scrivener, were explained to the testator so that he thoroughly understood it, and that he knew and understood the condition of his estate and the proportion which would be

taken by the scrivener. With all this the language of the qualification did not deal. It was not considering or discussing that subject, it merely asserted the existence of the obligation in question as a result of the one fact previously stated. What effect would result if the testator's mind was weak and no explanation was made, had been fully discussed in the general charge, and of that no complaint is made. Generally the rule is announced in connection with the facts which gave occasion for its utterance, and as ordinarily stated, the fact that the scrivener took a large interest under the will if the testator was of weak mind, and no explanation of the condition of the estate or the amount of the gift was made, is much more than a suspicious circumstance. It is a controlling fact and determines the case against the scrivener.

If we turn to the authorities it will be apparent that the court below did not transcend them in using the language we are now considering. Thus, in *Redfield on Wills*, 515, the writer says: "Where the party to be benefited by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation. Thus, where a will was written by an attorney or solicitor who is to be benefited by its provisions, it was considered that this circumstance should excite stricter scrutiny, and required clearer proof of capacity and the free exercise of voluntary choice." The whole of this language was embodied and adopted in the opinion of this court in the case of *Boyd v. Boyd*, 16 P. F. S. 283.

In *Dean v. Negly* (5 Wr.), on p. 317, Lowrie, C. J., speaking of the relations of attorney, guardian and trustee, and of persons using them for their own advantage, says: "In their legitimate operation, those positions of influence are respected; but where apparently used to obtain selfish advantages they are regarded with deep suspicion."

In the case of *Harrison's Appeal* (4 Out. 458) the very able opinion of Judge Elwell was adopted as the opinion of this court. That learned judge, discussing this very question of the effect of the fact we are considering, upon the validity of a disputed testamentary writing, says: "On this branch of

the case then it only remains to inquire whether the will is rendered invalid by the fact that the scrivener is himself a legatee in trust for others, and that his wife, the daughter of the testator, is a legatee of the larger portion of the estate. It would be profitless, in this connection, to trace the law on this subject from the civil law down through the varying decisions of the courts to the present time. The rule in England at the present day is, that when a person prepares a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight according to the facts of each particular case, in some of no weight at all, varying according to the circumstances, such as the quantum of the legacy, and the proportion it bears to property disposed of, but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court investigating the case. If there is no proof beyond the fact that the will was drawn by the legatee, the suspicion in ordinary cases would be removed by the fact of execution with knowledge of and assent to the contents of the instrument (*Barry v. Butlin*, 1 Curt. 637; *Durling v. Loveland*, 2 Id. 225)."

In *Butlin v. Barry* (1 Curt. 614) the court said: "Now the principles applicable to such a case are to be collected from a variety of cases in this court sanctioned by other courts (*Paske v. Ollatt*, 2 Phill. 323; *Ingram v. Wyatt*, 4 Hagg. Eccl. Rep. 384), and other cases founded upon precedents in the earliest times, the result of which is, that where a paper has been drawn up by a person for his own benefit, or when he takes a considerable benefit under it, the presumption lies strongly against the act, and it requires to be proved by satisfactory evidence *dehors* the instrument that it was the free and voluntary act of a capable testator, and executed with a full knowledge of its contents and effect."

When this case came up on appeal as *Barry v. Butlin* (1 Curt. 637), the court, Mr. Baron Park delivering the opinion, said: "The rules of law according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal.

. . . The second (rule) is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

In *Billinghurst v. Vickers* (1 Phill. 187) the court said: "The presumption, also, is strong against an act done by the agency of the party benefited. The act is not actually defeated as it was by the civil law, provided the intention can be fairly deduced from other circumstances. Though the court will not presume fraud it will require strong proofs of intention."

In *Paske v. Ollatt* (2 Phill. 323), it was said: "The court is always extremely jealous of a circumstance of this nature. By the Roman law *qui se scripsit heredem* could take no benefit under a will. By the law of England this is not the case, but the law of England requires in all instances of the sort that the proof should be clear and decisive. The balance must not be left *in equilibrio*; the proof must go not merely to the act of signing but to the knowledge of the contents of the paper. In ordinary cases this is not necessary, but where the person who prepares the instrument and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person; propriety and delicacy would infer that he should not conduct the transaction."

In *Drake's Appeal* (45 Conn. 21) it was said: "The amount of proof required varies with the circumstances. If the interest is small in proportion to the whole estate, and the decedent at the time of making the will was in health and in the possession of his faculties, slight proof will suffice. On the other hand, if his mind is feeble and the party drawing the will takes a considerable portion of the estate to the exclusion of heirs, proof of the most conclusive nature will be required."

There is nothing in any of these utterances at all in conflict with the decisions of this court. On the contrary, they are quite in harmony with all we have said upon the general subject. Because we have said in cases where the facts were present, that where a "testator is shown by evidence to be weak in mind, whether arising from age, bodily infirmity, great sorrow, or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken receives a large benefit under the instrument propounded as a will, it must be shown affirmatively that the alleged testator had full understanding of the nature of the disposition contained in it," it must not be inferred that we either said or implied that where a confidential agent acting as scrivener for a testator prepares and superintends the execution of a will under which he receives a large benefit, that fact is not to be regarded as even a circumstance of suspicion against the scrivener unless all the other facts stated accompany the transaction. It undoubtedly is a circumstance of suspicion in any case standing by itself alone, and the question how far it is to be efficacious in determining the validity of the testament, depends upon how far the other facts stated were present, and upon the character and the sufficiency of the explanation furnished by the scrivener. If these are not satisfactory to the judicial mind the fact which was a circumstance of suspicion becomes the basis of an adverse judgment.

It is almost unnecessary to add that this rule is a rule of general application to all kinds of instruments, the procurers of which are large beneficiaries by virtue of their operation. It is a rule of equity and is of very ancient origin. In its ordinary statement the fact of mental weakness in the grantor does not appear, and is not at all necessary to the application of the rule in a given case. Many, if not most of the judicial illustrations of its application are devoid of this element. *Huguenin v. Baseley* (14 Ves. 278) is a noted instance of this class, and it has been many times recognized and followed as authority by this court. In the admirable and exhaustive notes of Hare & Wallace to that case, appearing in 2 Lead.

Cas. in Equity, part 2, p. *480, numerous instances of a similar character are cited and discussed, in which the fiduciary relation of the beneficiary was the chief basis for equitable intervention, mental weakness being quite subordinate. Of course where mental weakness is present the burden of the confidential beneficiary is vastly increased, and it may determine the case against him when the other facts might not be sufficient. After a very extended reading of the cases the writer feels justified in saying that in all of them the confidential relation of the beneficiary to the benefactor is a most important element of the inquiry and in none of them is it regarded as less than a circumstance of suspicion requiring explanation. The eleventh assignment is not sustained.

The same considerations apply to the *fifteenth assignment*, and require its dismissal.

Twelfth assignment. The plaintiff's fifth point asked a binding instruction to the jury to find in their favor absolutely if they believed Mr. Neill was of sound mind and knew the contents of the codicil when he executed it. The court could not do this without ignoring entirely the issue of undue influence, which was granted by the Orphans' Court after this court had declared that there was evidence enough in the case to carry that question to the jury. It was the positive duty of the court below, if the point was affirmed, to qualify it so as to leave the question of the free will of the testator still with the jury. It would have been clear error if this had not been done. It was quite too narrow a view of the language of the qualification to say that it presented to the jury a question of actual coercion or constraint. It left to them the whole question of the free execution of the codicil without any species of coercion or constraint from any source. This, of course, includes the kind of coercion which results from the use of undue influence. As a legal proposition, the answer to the point is undoubtedly correct. The only objection made to it is that it suggested or rather referred to the jury a question of which there was no evidence, to wit, actual coercion. We do not so understand it. The kind of coercion which consists of undue influence was most fully and correctly explained to the

jury in the general charge, and there was no danger of their being misled upon this subject by the language used in the qualification of the answer. The twelfth assignment is not sustained.

Thirteenth assignment. The eighth point of the plaintiffs asked the court to say that if the will and codicil were read to Mr. Neill by his direction after they were executed, and he was in a condition of mind to fully comprehend the meaning and effect of the codicil, and after hearing them read he said in substance it was what he wanted, and allowed the codicil to remain unaltered for a month or two while he was competent to direct a change therein, the jury might find for the plaintiffs on all the issues. The court declined to affirm the point, saying that although Mr. Neill's mind may have been in a condition to fully comprehend the meaning and effect of the codicil, yet if his mind had become impaired it must be clearly shown, either that it was explained to him what the value of his estate was, and how much he was giving to Yardley, or that he fully understood the same without such explanation. We cannot possibly see any error in this. The attempt of the point was to substitute a general knowledge of the meaning and effect of the codicil, for that precise and definite knowledge of the condition and amount of the estate, and the proportion of it which the confidential beneficiary was to take, which the courts have said, many times over, the testator must have in order that the testament may stand. As we understand and have repeatedly declared the law, a capacity to understand the meaning and effect of a will may co-exist with its invalidity, if the testator was of weak mind, and the principal object of his bounty was his confidential agent who wrote it. This consideration fully justified the court below in the answer given to the point. The thirteenth assignment is not sustained.

Fourteenth assignment. The first point of the defendants expresses in substance, and almost in words, the ruling of this court in *Cuthbertson's Appeal*, and, therefore, it was not error to affirm it. The concluding sentence is not drawn with perfect accuracy, as it seemingly asks for a peremptory in-

struction to find for the defendants on one of the issues. But this sentence is preceded by a hypothesis as to the mental condition of the testator at the execution of the codicil, and we assume, as counsel on both sides and the court below did, that the conclusion was based upon the truth of the hypothesis. In this view the affirmance was correct, as it is entirely without question that Yardley gave no explanation to Neill when the codicil was executed or at the previous interview, either of the condition or value of Neill's estate, or of the proportion of it which the codicil gave to Yardley. The assignment is not sustained.

Sixteenth assignment. Complaint is made of the answer given by the court to the question asked by the jury, partly because the court did not define more precisely the degree of mental weakness on the part of the testator which would cast the duty of explanation upon Yardley, and partly because of the concluding sentence of the answer as to whether Neill was the man he was when the will was made. If the court had said to the jury that they should find for the defendants if they found that the testator was not the same man physically and mentally when he made the codicil as when he made the will, such direction would have been open to serious objection. But the court did not say this. The question was, "If Mr. Neill's mind was *at all* impaired on the 2d of December, 1876, was Yardley in that event obliged to acquaint Neill as to the probable amount which he, Yardley, would take under the residuary clause in the codicil? If such is the law in this case would Yardley's failure to so acquaint Neill render the codicil null and void?" The answer was: "The Supreme Court has said that if the mind has become weak or impaired it is the duty of the scrivener to acquaint the testator with the value of his property, and with the amount the scrivener would take under the will. I cannot undertake to draw a rule by which the degree to which a mind has weakened must be measured. If Mr. Neill's mind has become weak such explanation must be shown, to authorize the jury to find a verdict in favor of the codicil, or, as the Supreme Court has stated it, the jury must say whether the testator was physi-

cally and intellectually the same man when he executed the codicil as when he made the original will." This question was asked with reference to the facts of this case and we think the correctness of the answer must be determined by a consideration of those facts. If the legacy to Yardley had been a few hundred, or even a few thousand, dollars, and the amount was expressly stated, it is apparent that a low degree of mental power on the part of the testator would have sufficed to understand and comprehend it, and to estimate the proportion it bore to the rest of the estate. If Yardley had really rendered valuable services to Neill, and Neill had expressed a sense of obligation for them, and a desire to reward him in his will, it would be still more apparent that a low grade of intellectual force would have been sufficient for the appreciation of a gift in his favor, especially if the amount of it were named. If Yardley had been interested in the residue under the will, which undoubtedly expressed Mr. Neill's intelligent consciousness of the disposition of his estate, it could at least have been said that the testator certainly intended he should have some part of the residue, and it would then only have been necessary that he should be mentally able to understand the difference between the part given by the will and that given by the codicil. But none of these facts existed. The change made by the codicil was vital in all respects. It created a new and entirely different distribution of the testator's estate from that established by the will. Legacies given to friends and to charities, upon the most deliberate and thoughtful purpose, when his affections, his instincts of philanthropy, his well-informed conscience, his personal desire dominated his intelligent action, were stricken down without any assigned, indeed, without a conceivable, reason. Gifts which he certainly did desire to make to the extent of \$175,000, when he knew his own mind, were reduced to one-fifth part of that sum without a word of explanation, without the slightest intimation that he was in the last degree dissatisfied with his former purpose. But over and above and beyond all these considerations, the vast residuum of the estate, constituting nearly four-fifths of its bulk, was given by the codicil to one

who would not have received a dollar of it by the will. And that one was the adviser, the confidential agent, the selected and trusted scrivener who wrote the codicil, and who wrote himself into it in such a fashion as to take almost the entire substance of the estate. It was neither a small nor an ordinary estate. It consisted of many items of personalty and of realty. In its aggregate it represented a very large sum of money, more than \$400,000. Did Mr. Neill know and understand, when he executed the codicil, that he was giving to Mr. Yardley nearly the whole of this great estate, that he was taking away from his former legatees four-fifths of the sums which he gave them when he well knew his own desire? If he did, he had the undoubted right to do just as he pleased and no man could gainsay his action. But if he did not, the law protects him though he did not protect himself. In such circumstances as these the law is very jealous indeed. In conducting its inquiries it increases its precautions and the severity of its tests, in proportion to the increased gravity of the facts and the magnitude of the interests involved. Such is the teaching of all the cases. In this case the question we are considering is how much mental impairment was required to cast upon the scrivener, who took the bulk of the estate under a codicil, written by himself, when that codicil totally changed the provisions of a previous will in this respect, the duty of explaining to the testator the meaning and effect of the codicil, and the proportion of the estate which he would probably take under its provisions. The learned judge answered the question by saying he could not draw a rule by which the degree to which the mind was weakened must be measured in such circumstances. He repeated the rule so often stated by this and other courts that if the mind has become weak or impaired, it is the duty of the scrivener to acquaint the testator with the value of his property, and with the amount the scrivener would take under the will. Clearly there was no error in this. Who can fix by a defined rule the amount of the mental weakness which shall impose the duty of explanation in such a case? It is not possible to state a rule which would be applicable to all cases alike, and the circumstances of this case are of so very

peculiar a character, that if the learned judge had said that any mental impairment which was appreciable would cast the duty of explanation upon the scrivener he would scarcely have been in error. In *Wilson v. Mitchell* (5 Out. on p. 505) we said, "in the case of an old, infirm and mentally weak man, disposing of his estate in favor of his confidential adviser, the general rule that testamentary capacity and knowledge of the disposition made are presumed, does not apply. There should be very clear evidence of mental capacity, and proof independent of the execution of the will that Mr. Dougal's mind was free, and unbiased by the counsel's advice or influence of Mr. Mitchell in so executing it. The beneficiary himself is a competent witness and cannot complain that the rule is hard or unjust, which requires him to make it clearly appear that the gift to him was the free intelligent act of the testator." The learned judge in the court below went no further than this. It is not necessary to go beyond the testimony of Mr. Yardley himself to learn that no word of explanation was offered by him to Mr. Neill upon this most important subject. And it is not easy to understand the facts attending the preparation of the codicil, just as they were stated by Yardley, except upon the theory of very considerable mental impairment on the part of Mr. Neill from the time he made his will. It is incredible that he would have made such extraordinary changes in his will without the slightest comment or explanatory remark unless his mental faculties had become considerably impaired. Upon Miss Lambert's account of the transaction such a conclusion cannot be resisted.

What the learned judge said in conclusion about the jury finding whether the testator was physically and intellectually the same man when he executed the codicil as when he made the original will, was preceded in the same sentence by the hypothesis that he had become of weak mind. It was a mere repetition of the very same expression used by him in the general charge, and used in such a manner and with such precise and definite explanations that no assignment of error has been made to it, or could be, with any hope of success. It is but fair to the court below to consider what he there said on the

same subject in connection with what was said in answer to the question of the jury. The defendants' second point asked the court to say that if the jury believed that Neill was not the same man physically and intellectually when he executed the codicil as when he made the will, the burden of proof was thrown upon Yardley to prove that Neill fully understood the value of his property and the probable residue after paying all his legacies. This the court declined to do, saying, "I decline to affirm this point as it is stated. It is a question of fact for the jury to say whether the mental faculties of John L. Neill had failed: his physical condition is comparatively unimportant except as connected with, or causing a failure of mental powers." In the general charge the court, after explaining most carefully and correctly the effects of the possible weakening of the testator's mental powers and the duty which in that event was cast upon Yardley, proceeds thus, "This case you will therefore see hinges to a great extent on the possession by the testator of a mind that had not weakened or become impaired on the 2d of December, 1876; this implies the retention of memory, understanding and will, and is therefore to be decided mainly by the evidence in the cause which bears directly or indirectly on this question. If you believe it has been shown that the testator's mind had not become impaired, that his memory and understanding retained their full powers, that his will was as resolute and unyielding as before he was stricken with what Dr. Drysdale characterizes as an incurable malady, your way would seem to be clear in rendering a verdict in favor of the plaintiffs on all the issues. . . . On the other hand, if the evidence satisfies you that testator's mind was weakened, that he had gone down both physically and mentally under the afflictions which fell upon him, or, as the Supreme Court say, if this inquiry leads you to the belief that mentally and physically he was not the John L. Neill as when he wrote the original will of 1874, then you are to say whether all that the law in such a case requires has been made to appear. . . . Is there any other evidence in the cause that shows clearly that though his mind had weakened, his memory and understanding was sufficiently strong

and clear to have enabled him to understand the nature of his testamentary dispositions and that he did in fact fully and beyond question understand them." It is difficult to understand how the court could have defined more minutely or intelligently the limitations of the subject, than was done in the foregoing language. That it was correctly done is intrinsically evident, and the very able counsel for the plaintiffs in error have shown their appreciation of this by taking no exception and filing no specification of error to it. And yet in substance the answer given to the question of the jury is the same. The question did not relate to the issue of sanity on which the verdict for the defendants was rendered, and on the other issue it related only to the question of Yardley's duty, which was apparent upon almost any view of the testimony it is possible to take consistently with the extraordinary facts which are quite undisputed. The sixteenth assignment is not sustained.

Judgment affirmed.

MERCUR, C. J., and CLARK, J., dissented.

Undue Influence.—What Constitutes.—"The very nature of a will requires that it should be freely and voluntarily executed, hence anything which destroys this freedom of volition invalidates a will; such as fraudulent practices upon testator's fears, affections, or sympathies; duress, or any undue influence whereby the will of another is substituted for the wishes of the testator." Ga. Code (1861), § 2369. And "a will procured by misrepresentations or fraud of any kind, to the injury of the heirs at law, is void." Id. § 2870.

This is the doctrine of the common law and it has become a part of the statutory law of Georgia, California, Dakota, Montana, and Utah, and similar enactments exist in Ohio and Illinois. Stimson's Am. Stat. L. (Jan. 1, 1886), § 2605.

The influence on account of which a testament will be disallowed, must have been such as to have destroyed freedom of action, and have consisted of coercion or importunities which could not be resisted. *Lyman v. Conrey*, 60 Md. 286. So overpowering the testator's volition as to produce a disposition of the property which he would not have made if left free to act. *Marx v. McGlynn*, 88 N. Y. 357.

The various means employed to influence testators unduly are too numerous for specific mention, but whatever destroys free agency and constrains a person to do what is against his will and what he would not do if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. *Haydock v. Haydock*, 33 N. J. Eq. 494.

For undue influence is not measured by degree or extent, but by its effect. If it is sufficient to destroy free agency it is undue, even if it is slight. *Haydock v. Haydock*, 33 N. J. Eq. 494.

The constraint must be present operating upon the mind of the testator in the very act of making the will. In *re Shaw's Will*, 11 Phila. 51. So that influence shown to have existed eleven years before the execution of the will, with no proof of continuance, is too remote to be considered undue. *Ketchum v. Stearns*, 76 Mo. 396.

There can be no undue influence unless there is a person incapable of protecting himself, as well as a wrongdoer to be resisted. *Latham v. Udell*, 38 Mich. 238.

While fraud and undue influence go often hand in hand, they are not necessarily associated: and undue influence and importunity, sufficient to invalidate a will, may be exercised without the existence of fraud. *Stewart v. Elliott*, 2 Mackey, 307. Nay, often with the purest intentions.

Undue Influence.—What does not Constitute.—Not every influence brought to bear upon a testator is necessarily undue. *Schofield v. Walker*, 58 Mich. 96.

A wife may properly influence the making of her husband's will for her own benefit or for the benefit of others, provided she do not act fraudulently or extort benefits from her husband when he is not in a condition to exercise his faculties as a free agent. *Latham v. Udell*, 38 Mich. 238; *Pierce v. Pierce*, 38 Mich. 412; *Hughes v. Murther*, 32 N. J. Eq. 288.

Influence obtained, not by destroying the free agency of the testator, but by argument, persuasion, and appeals to the affection, is not undue; nor is earnest solicitation alone; nor arguments addressed to a testator's good feeling, and simply influencing his better judgment. *Wise v. Foote*, 81 Ky. 10; *Wait v. Breeze*, 18 Hun, 403; *Tucker v. Field*, 5 Redf. 139.

And the services of a friend or relative of a testator may be lawfully urged as an argument to persuade him to the giving of a legacy. *William's Estate*, 18 Phila. 302; *Miller v. Miller*, 8 Serg. & R. 269; *Dean v. Negley*, 5 Wright, 317.

Gifts to One in a Fiduciary Relation.—The proponent of a will is not bound, in the first instance, to prove capacity and freedom from constraint. These are presumed when the testator is of sound mind. *Ewen*

v. Perrine, 5 Redf. 640; Herbert v. Berrier, 81 Ind. 1; Whelpley v. Loder, 1 Demarest, 368.

Until some suspicious circumstance be shown, the burden of proof is upon the side seeking to establish undue influence. Webber v. Sullivan, 58 Iowa, 260.

While it is generally true that undue influence must be proven, and that it will not be presumed (In re Martin, 98 N. Y. 193; Beekman v. Beekman, 2 Demarest, 635), yet there are certain cases in which it may be established by a slight degree of evidence, and others in which, certain facts being proven, it will rest with the beneficiary under the will to show affirmatively the absence of undue influence. Thus, taken in connection with other facts, it is often a cause of suspicion that gifts are made to persons standing in confidential or fiduciary relations to the testator, — legal, religious, and medical advisers, the scrivener of the will, guardians, trustees, or other persons having the ear of the testator. But in these cases the influence is one of fact to be drawn by the jury, and not a presumption of law. Horah v. Knox, 87 N. C. 483. And its strength will depend upon the circumstances of each case. Bristead v. Weeks, 5 Redf. 529.

A will by a female of sixteen, easily influenced and in poor health, made in favor of her guardian, who took an active part in its execution, should be subjected to close scrutiny. Seiter v. Straub, 1 Demarest, 264.

Evidence that the proponent of a will had, before its date and after an inquest, been appointed conservator of the testator, and continued to act in that capacity up to the date of the testator's death, is admissible on the question of "fraud, compulsion, or other improper conduct." Critz v. Peerce, 106 Ill. 167.

To sustain a will in favor of a religious adviser, to the exclusion of the natural objects of the testator's bounty, proof of the bare making of the will is not sufficient; there must also be evidence that the testator was of ordinary intelligence, that he acted voluntarily, without persuasion, and that he made fair provision for those who would naturally be his heirs. Marx v. McGlynn, 88 N. Y. 357.

Where a convert to spiritualism, whose life was dominated thereby, and who was influenced by the person through whom he had embraced that belief to become alienated from his wife and child and to make a will in favor of his adviser, the facts were considered sufficient to justify setting the will aside. Thompson v. Hawks, 14 Fed. Rep. 902.

There was not sufficient ground for presuming undue influence from the fact that a testatrix devised her real estate to a priest in trust for a Romish church of which she was a member, the priest attending to drawing and executing the will for her through a lawyer, at her request, the will being in accordance with her previously declared intentions, although she had held no conversation with the priest upon the subject before her sickness. Kerrigan v. Leonard, (N. J., 1887) 8 Atlan. Rep. 508.

A legacy to the wife of one standing in such a relation, but who was not proven to have drafted the will, nor to have given advice as to its provisions, nor to have known of the testator's intention to make it, was not vitiated by the bare existence of the relation. *Bristed v. Weeks*, 5 Redf. 592.

It has been held that an attorney who has been the testator's legal adviser, and who draws a will containing a legacy to himself, must show affirmatively the absence of fraud and undue influence. *Post v. Marson*, 26 Hun, 187.

But in a higher court in the same case it was said that there is no presumption of fraud and undue influence from a legacy to one who had been the testator's legal adviser for a long time, and who was the scrivener of the will. *Post v. Mason*, 91 N. Y. 539; a. c., 48 Am. Rep. 689.

The bare facts that the draughtsman was made executor, and that his relatives received much of the property, do not of themselves raise a presumption of undue influence. *Carter v. Dixon*, 69 Ga. 82. Nor does the fact that a will was drawn by a confidential friend of the testator, and that his wife was a beneficiary. *Montague v. Allan*, 78 Va. 592; a. c., 49 Am. Rep. 384. Nor the fact that a will was drawn by a favored legatee. *Rusling v. Rusling*, 86 N. J. Eq. 603. *Contra*, *Estate of Byrne*, Myrick, 1. And in the relation of parent and child, more must be shown by the contestants than an opportunity for unfair dealing. *In re Martin*, 98 N. Y. 198.

Unnatural Bequests.—These suspicious circumstances *dehors* the instrument may be heightened in effect by the provisions of the will itself, as where it shows an unaccountable preference for one child above another, or where a large portion of the estate is devised away from those whom natural affection would select as the beneficiaries of the testator's bounty. Accordingly, we find it held that where the testator's mind was very feeble at the time he executed the will, rendering him liable to undue influence, an unnatural and unreasonable disinheriting of one who would naturally share in the property, should be shown to have been freely and intelligently made. *Esterbrook v. Gardner*, 2 Demarest, 548.

In a recent case it has been held that where the preponderance of evidence showed that the testatrix was not acquainted with the contents of the will; that it was executed by her at the instigation of the proponent, who drew it, and who was inequitably preferred over the other children; that the testatrix was at the time in a state of excessive physical feebleness and exhaustion; and that she had frequently expressed her intent to make an equal distribution among all the children, the question of fraud and undue influence were properly submitted to the jury. *Blume v. Hartman*, (Penn., 1887) 8 Atlan. Rep. 319.

It is competent to show that no foundation existed for the exclusion

of the children of a first marriage from participation in the estate. *Mullen v. Helderman*, 87 N. C. 471.

The facts were considered sufficient to show undue influence in a case in which a bachelor, over seventy years of age, while in a moribund condition, executed, at the instance of his housekeeper, a will which she had had prepared for four years, which gave her all of his property, and of which his relatives and his brother, who lived in an adjoining house, had no knowledge. *Bayard v. Conover*, 89 N. J. Eq. 244.

So, too, in a case where, for three months before executing her will, a testatrix in feeble health was in personal intercourse with a son who was apparently hostile to her other son, and who prevented the latter from visiting his mother; and under these circumstances the will was written, devising her whole fortune of forty-five thousand dollars to the former, except two thousand dollars to the children of the latter. *Dale v. Dale*, 38 N. J. Eq. 274. *Cf. Greenwood v. Cline*, 7 Oregon, 17.

But unequal distribution alone, in absence of proof of fraud and incapacity, will not raise a presumption of undue influence. *Kitchell v. Beach*, 35 N. J. Eq. 446.

Thus, in a case in which a mother gave nearly all her property to one son who was on confidential terms with her, and assisted in having the will drawn and executed, and the evidence showed that she harbored resentment against her other son on account of certain business transactions between them, these facts were not considered sufficient to establish undue influence over a testatrix of sound mind in the absence of proof of importunity or persuasion. *Dale v. Dale*, 36 N. J. Eq. 269.

In a late New Jersey case a charge of undue influence was considered not to be sustained by the fact that a testator, shortly after the discharge of a son from an insane asylum, where he had been placed by his brothers in good faith, revoked a devise of a farm to him, and, by codicil, gave him instead an annuity of one hundred dollars, and thereafter attempted to change the codicil, but merely for the purpose of increasing the annuity to two hundred dollars. *Connover v. Connover* (N. J., 1886), 8 Atlan. Rep. 500.

The law does not regard as improper the presence of a brother nor of a nephew of the testator at the execution of the instrument, although they are legatees under the will. *Pennypacker v. Pennypacker* (Penn., 1886), 8 Atlan. Rep. 634.

And in general it may be said that undue influence and fraud in obtaining the testator's signature to an instrument other than that intended by him to be signed as his last will, are not to be lightly presumed; and when the evidence in support of such charges is overcome by the inherent probabilities of the case, a will is not to be rejected, even at the suit of children disinherited without apparent reason. *Hagan v. Yates*, 1 Demarest, 504.

Age or Infirmary of Testator.—Another circumstance which, in conjunction with others, often raises a suspicion of undue influence, is the age or bodily or mental infirmity of the testator.

For example, where a testator, old and suffering, at the solicitation of a friend, makes a will in his favor which revokes a previous will in favor of his relations, executed when he was in full mental and bodily health, there is sufficient ground for an issue as to undue influence, and the burden of proof is upon the proponent of the later will. *Wilson's Appeal*, 99 Penn. St. 545. *Of. Ewen v. Perrine*, 5 Redf. 640.

Evidence of feebleness and decrepitude, detention, and slanders upon beneficiaries of an altered will, throws the burden of proof upon the proponents of the codicils. *Swinarton v. Hancock*, 22 Hun, 38.

But age and infirmity alone will not be deemed a cause of suspicion where the bequests are in accordance with the usual dictates of natural affection. Thus a testatrix, ninety-four years of age, without near kindred, made a will leaving all her property to one who had sustained toward her the relation of a daughter for many years. Although her memory had failed considerably, her mind was not shown to have been impaired. In view of all the facts, it was decided that the will should not be set aside on the ground of undue influence; nor on the ground of mental incapacity. *Wood's Estate*, 13 Phila. 286.

As to a person of sound mind, the rule is different. It is not enough to show that the circumstances attending the execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. *Whelpley v. Loder*, 1 Demarest, 368.

MCCARTNEY vs. OSBURN.

[118 Illinois, 408.]

PER CAPITA OR PER STIRPES.—CONSTRUCTION OF A FOREIGN WILL.

Where there is a testamentary gift of property to one person and the children of another, all the beneficiaries, in the absence of a contrary intention to be gathered from the context, will take *per capita* and not *per stirpes*.

A decree of a court of competent jurisdiction in another State, determining the nature and extent of the interests given to the several devisees in such State,

is not binding upon the courts of this State as to the interests of the same devisees, under the same will, in lands in this State. As to the lands in this State, the *lex rei sitae* governs.

APPEAL from a decree of the Circuit Court of Cook county.

Williams & Thompson and *D. T. Watson*, for appellant.

N. M. Jones, for appellees.

MULKEY, J. (Omitting an immaterial point.) Following the line of argument pursued by counsel, we come now to the main question discussed in the briefs, namely, whether the rule *per capita* or *per stirpes* is to be applied in the division of the land in controversy. There is a question, however, underlying this, barely referred to in the argument, that first demands attention. If it should be conceded, for the purposes of the argument, that appellant, under the limitations of the will, is entitled to one-half the land in controversy, the important question would still remain, whether the children of Mrs. Osburn, now living, have, under the limitations of the will, a present vested interest in the other half, for if they have not, it is very clear they cannot maintain a bill for its partition. Both parties agree that the devise in question is to a class, so far as the heirs or children of Mrs. Osburn are concerned, and of this there can be no question. The only thing about which they differ is, whether, by the terms of the will, Harry McCartney is made a member of that class.

Waiving this matter, and leaving him, for the present, altogether out of view, the question recurs, does the record before us show a present vested interest in the Osburn children. It is believed to be universally true that where there is a simple devise to a class, and she will does not expressly, or by necessary implication, fix the time when the objects of the gift are to be ascertained or when distribution is to be made, the law itself will fix it at the testator's death, that

being the time when the will first speaks. In such cases the gift to the devisees vests, both in interest and in possession, at the same time, and after-born children will be excluded. This will fully appear from authorities hereafter cited. Every testamentary disposition is either to a specifically designated person or persons, or to an indefinite class, which is liable to fluctuate, from the births or deaths of such as come within the description of the class. When the devise is to the children of a living parent, the class is liable to fluctuate, from both causes, up to the time the gift takes effect in interest, which is most frequently at the death of the testator, but not always so. In the former case—that is, where the devisees are specifically pointed out, whether by name or otherwise—if one or more of them die before the testator, the shares of those so dying will lapse; yet, in the latter case, the shares of those dying before the testator, or, indeed, at any time before they vest in interest, will not lapse, but will inure to the benefit of the survivors. Strictly speaking, in contemplation of law the class to whom a gift or devise is limited, consists, in all cases, exclusively of such persons coming within the description of the class as are *in esse* at the time the gift or devise, by its own limitation, takes effect in interest, and such as are born before distribution, where distribution is deferred to a subsequent period. Those that die before the gift takes effect in interest, are not regarded as having ever belonged to the class.

It is hardly necessary to remark that a gift or devise is said to vest in interest when the right of property first attaches, without regard to whether there is a present right of possession or not. When the right of possession accrues, the gift or devise is then said to vest in possession—in other words, the time of payment or distribution has then arrived. Most of the cases to be met with in the books relating to the vesting of testamentary dispositions, will be found to fall within one or the other of the following classes: First, where the gift takes effect, both in interest and possession, at the death of the testator—and this is always the case when limited *per verba de presenti*, unless such vesting is expressly, or

by necessary implication, deferred to a future period ; second, where the gift is so limited as to take effect, both in interest and possession, at a specified time subsequent to the testator's death ; third, where it is limited to take effect in interest at the testator's death, but the vesting in possession is deferred to a future period ; and fourth, where the gift is limited in such a manner as to take effect, both in interest and possession, upon some contingency or event which may or may not happen till after the testator's death. If the event or contingency happens after his death, the gift will, of course, then vest absolutely ; if before, it will then so vest at the testator's death. These several kinds of limitations are applicable alike to classes and individuals.

With respect to cases falling within the first and second classes above mentioned, nothing special need be said, except, perhaps, to remark, that where the gift or devise is to a class, none will be permitted to take except such as are *in esse* at the time of distribution. This principle, however, applies to all gifts to classes, with the qualification, that where the gift or devise is to a class, as tenants in common, with no provision for survivorship, and one or more of the class die after the gift or devise has taken effect in interest, and before the time of distribution, the shares or portions of those so dying will go to their devisees, or, in case of intestacy, to their heirs or next of kin, as the case may be. Even where a gift or devise is limited to such of the children of a particular person as shall attain a given age—twenty-one years, for instance—it is held, the first child attaining the required age is entitled to have allotted to him his portion of the estate, and since his share must necessarily be determined upon the basis of the number of children composing the class at that time, it is well established in such cases that after-born children, who would otherwise be entitled to take, are excluded (*Gimblett v. Purton*, 12 L. R. Eq. 427), while a gift to a class falling within either the third or fourth divisions above mentioned will open to let in after-born children, subject to the limitation, they must be *in esse* at the time of distribution. Yet, after the estate has once vested in interest, except in cases of joint

tenancy, or where the right of survivorship is expressly, or by necessary implication, given, the shares of such as die before distribution will not inure to the benefit of the survivors, as they would do if the estate had not vested in interest before their decease, but will devolve upon the legal representatives of those so dying. (*Middleton v. Messenger*, 5 Ves. 136; *Evans v. Jones*, 2 Coll. Ch. 516; *Watson v. Watson*, 11 Sim. 73; *Walker v. Shore*, 15 Ves. 121.) Cases falling within the third and fourth classes mentioned, most frequently occur where a limited estate in the property bequeathed has been first carved out, with a gift over, to take effect at a specified time, or upon the happening of some contingency, or the occurring of some event, such as the death of the tenant of the particular estate, or of some other designated person.

In ascertaining the period at which a gift vests in interest, the cases last mentioned are to be carefully distinguished from those in which no preceding estate or subordinate interest has been first carved out of the property devised, otherwise there will sometimes be an apparent conflict between cases, when, in fact, there is none at all. The property involved in this case, however, is unaffected by the specific legacies to Harry McCartney, Mrs. Osburn, or to others. No preceding estate or subordinate interest is carved out of it. The devise is an original, absolute gift to those entitled at the time the will takes effect in interest. This being so, the inquiry arises, is the limitation in the present case a simple devise to the children, to take effect in interest and possession at the death of the testator, or does the gift vest in interest at his death, but not in possession till some future period? Or, again, does the gift take effect, both in interest and possession, at a period subsequent to his death?

The rule is well settled, that a gift of personal estate at a specified future time or upon the happening of a certain contingency, will not vest till the time specified has arrived, or until the contingency has happened, as the case may be. But if the gift is general, and there is merely a simple direction that it be paid, or that the fund be distributed or divided, at a specified time, or upon the happening of a like contingency, it

will vest at the testator's death, and the payment or distribution only will be postponed. (*Chaffers v. Hill*, 3 Jur. 577; *Wadley v. North*, 3 Ves. 364; *Hixon v. Oliver*, 13 Id. 113; *Mackell v. Winter*, 3 Id. 236.) This distinction, however, by the current of authority, has no application to a devise of real estate. The rule was borrowed from the civil law by the ecclesiastical courts, and was followed by the other courts of England in respect to gifts of personal property only. As to real property, the courts went in the opposite direction, rather, even so far as to hold that a legacy, charged upon real estate, and payable at a future day, sinks, as to the real estate, by the death of the legatee before the time of payment, and in such case the assets could not be marshaled. (*Pearce v. Loman*, 3 Ves. 135.) But since, with us, all debts are, by statute, made a charge upon real estate as well as personal estate, the rule or distinction in question has become practically of but little importance.

Recurring now to the more vital points in the case, we will say, in general terms, that, all the provisions of the will considered, we do not think it was the intention of the testator that the residue of his estate in question, including the property now in dispute, should be divided at his death. The language of the fourth clause is: "I would rather prefer not to have a division made of my estate until the youngest child of Henrietta arrives at the age of twenty-one years." These words leave no doubt as to what the testator's intentions and wishes were with respect to the time of distribution. Nor does the fact that his intentions are expressed in the form of a wish, make them any the less imperative. It is a familiar doctrine in the law of wills, that a clearly expressed wish by the testator is equivalent to a positive direction or command. But the testator does not stop at this. In the following sentence he proceeds to authorize his executors to make advances to such of the children as should attain the age of twenty-one, and should be desirous of going into business. These provisions of the will are wholly inconsistent with the theory that the persons entitled to take are to be ascertained, and the property distributed, at the death of the testator. Indeed,

the whole scheme of the will forbids the adoption of such a theory.

In this connection, it is proper to remark, that where a will, as in this case, contemplates distribution at a period subsequent to the death of the testator, the time must be fixed by the will itself. It cannot be left open, to be determined by the executors, as whim or caprice may suggest. A will, therefore, should not be so construed as to confer such a power on the executors. (*Hill v. Chapman*, 1 Ves. 405 [Semmes' ed.], note b; *Jenkins v. Freyer*, 4 Paige, 47; *Butler v. Ommancy*, 4 Russ. 70.] By the English chancery rule, executors are given twelve months from the death of the testator in which to pay vested legacies, where a different period is not fixed by the will itself.

As we construe the will, the time of distribution is fixed when the youngest child of Mrs. Osburn attains the age of twenty-one years—a period which has not yet arrived. While, as we have just seen, a gift to a class may be so limited as to take effect in interest at the testator's death, and yet not vest in possession till a future period, still we do not think this is a case of that kind. As already seen, the general rule is, that when there is a simple gift to a class, to be *paid* at a fixed time, or upon an event or contingency which may happen after the death of the testator, and nothing appears to show a contrary intention, the gift will vest in interest at the testator's death, and the time of distribution, only, will be deferred. If, however, the element of futurity is annexed to the gift itself, and is not merely indicative of the time of payment, or if the time of payment is made descriptive of the class that is to take, the gift will not vest in interest till the time so fixed for payment or distribution has arrived. (*Williams v. Williams*, 6 L. R. Ch. 782; *Festing v. Allen*, 5 Hare, 572; *Vawdry v. Geddes*, 1 R. & M. 203; *Bull v. Pritchard*, 5 Hare, 572; *Taylor v. Gould*, 10 Barb. 388; *Burrows v. Sherm*, 22 How. Pr. 169; *Show v. Snow*, 49 Me. 159; *Moore v. Smith*, 9 Watts, 403; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315; *Collier v. Slaughter*, 20 Ala. 263;

Butler v. Butler, 3 Barb. Ch. 304; *Radcliff v. Bagshaw*, 6 Tenn. 512.)

Waiving the consideration that the distinction between a gift at a specified time, and a gift generally, *to be paid* at a like specified time, has no application to a devise of real property, and applying to the limitation under consideration the most liberal rule in favor of vesting, still we do not think the property in controversy has yet vested in interest. It will be observed, that no direct gift to the devisees is to be found in the will, but only such as is implied from the testator's expressed wish that the estate should be divided between them; yet we regard this as equivalent to a direct gift. The devise, as we construe it, is an original, absolute gift, at a particular time, to such of the children of Mrs. Osburn *as shall be living at the* designated time. By the terms of the limitation the element of futurity is clearly annexed to the gift itself, and is descriptive of those who are to take. It is only those who are living at that time that come within the description of the class, and to say that parties may take a vested interest under a devise to a class who do not answer all the marks by which the class is to be ascertained, is to confound all distinctions, and disregard the plain requirements of the will. The only thing in the will that affords the slightest foundation for the construction that would give the children of Mrs. Osburn a vested interest in the estate, at the testator's death, is found in the following language, occurring in the fourth clause of the will, namely: "But should any of the heirs, after arriving at that age, wish to engage in business, and wish to realize any portion of *their interest* in said estate, my executors *can* give them such an amount as they may think proper, and take their individual note or notes, bearing interest, to be added thereto, and deducted from their respective portions of said estate on the final division of the same."

We are of opinion no special significance is to be attached to the fact that the testator in this connection speaks of the heirs' "interest in" or "portion of" the estate. In the connection in which these expressions occur, the testator doubtless means nothing more than the presumptive or prospective

interests or portions of the children. (*Ring v. Hardwick*, 2 Beav. 352; *Lake v. Robinson*, 2 Mer. 363, 381, 384; *Eccles v. Berkett*, 4 DeG. & S. 105.) This view, we think, is clearly strengthened by the reference to the final division of the estate in the conclusion of the citation. At any rate, the expressions in question cannot, on any principle of recognized construction, be permitted to control a clear and unequivocal limitation like the present, defining the time of distribution, and the class who are to take. This is expressly ruled in *Bull v. Pritchard*, 5 Hare, 567, and *Vawdry v. Geddes*, 1 Russ. & Mylne, 203. In addition to this, we think the fact that the testator required his executors to take notes for the amount of the advances, is a circumstance tending strongly to show that it was not his intention that the estate should vest in interest till the period of distribution—or, in other words, till the youngest child of Mrs. Osburn attained the age of twenty-one years. The same distinction which is taken between a gift on a particular day, and a gift to be paid on such day, is also taken between a case like the present, where there is a simple direction to divide at a specified time, and where there is an express gift, accompanied with a direction to divide at such specified time. In the first case, the gift does not vest till the time of division; in the second, it vests at the testator's death, and the division only is postponed. (2 Jarman on Wills, 455, *et seq.*) On page 457, the author expressly says: "Where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution, only, is deferred, but is one in which time is of the essence of the gift." That is exactly the case here. In short, we hold the executors take, by implication, a fee in the legal estate, for the purposes of the trust created by the will, and that the equitable interest does not vest till the youngest child of Mrs. Osburn attains the age of twenty-one years.

It necessarily follows, from this conclusion, that the present suit, in so far as it seeks a division of the land in question, is prematurely brought. It is manifest, that if the time of distribution is not fixed as stated, the will does not determine the

time at all, and hence it is fixed, as matter of law, at the death of the testator; for, as we have already seen, it is not a matter which can be left open, to be determined in the discretion of the executors. So, if we concede the will does not fix the time of distribution, and that, consequently, the estate vested, both in interest and possession, at the testator's death, then it is very clear, under the authorities, Mrs. Osburn's youngest child would not be entitled to take at all, as she was born more than a year after that time. This, of course, would lead to a reversal of the decree of the court below, as the decree places the youngest child upon the same footing with the other children.

Having reached this conclusion, we should feel inclined to withhold the expression of any opinion upon the question mainly discussed by counsel, namely, whether the property is to be divided *per capita* or *per stirpes*, but for the fact the will, as already seen, authorizes the executors, in certain contingencies, to make advances to the devisees on account of their prospective interests in the estate when they shall have attained the age of twenty-one years; and as it is manifest the executors could not so intelligently exercise the discretion with which they are clothed by the will in respect to such advances, without knowing the proportions in which they would be entitled to take, it is clearly important that the question should be now determined. Keeping in view what has already been said, a few words will suffice to present what we have to say on this subject.

It is conceded, and such is unquestionably the law, that if a testamentary gift be made to one person and the children of another person, as, for instance, to A and the children of B, A and the children of B, in such case, in the absence of anything to show a contrary intention, will take *per capita*, and not *per stirpes*. (2 Jarman on Wills, 756.) Yet it is equally well settled, that the opposite construction will prevail when the intention to that effect can be gathered from the context—or, in the somewhat quaint language of Jarman, “this mode of construction will yield to a very faint glimpse of a different intention in the context.” (Id. 757.)

The question for determination, then, is, what is there in the context to take the present case out of the general rule above stated, and which both parties fully recognize? After a very careful consideration of the various provisions of the will, we have been unable to discover anything which, in our judgment, affords even "a faint glimpse of an intention" on the part of the testator that the usual construction should be departed from in this case. Two facts are disclosed by the will which are supposed by counsel to afford such evidence, namely, first, that appellant is characterized in the will as *heir* of his deceased mother; and second, that the testator recognizes his rights and claims as such, in the legacy to him of \$30,000, and the giving of an equal amount to Mrs. Osburn, the sister of his deceased mother. These facts, particularly the last, are pressed with great earnestness. They will be considered together.

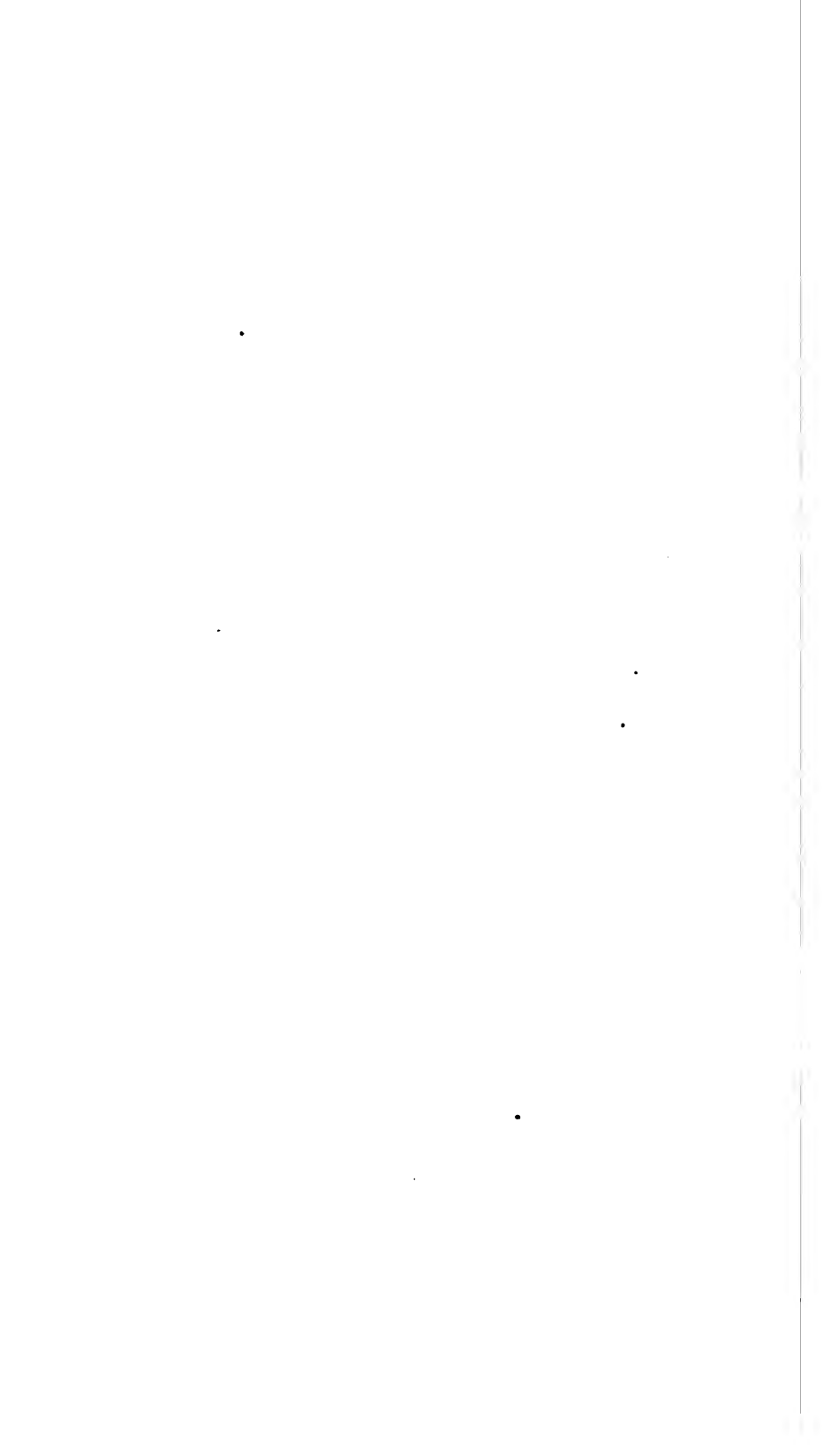
As to the first, we regard it as of no special significance, except that it is one, among others, which tends to show, as we have already seen, the testator, in disposing of his property, clearly had in mind the objects of his affections, both living and dead, and their relations to one another, as well as to himself. Thus viewing them, the appellant was presented to him in the two-fold character of sole representative of his deceased daughter, and also as a grandchild. That he should have intended, as we believe he did, to recognize him, in the disposition of his estate, in both these characters, was, to say the least of it, but natural. Having a living daughter, she was to be provided for, and the testator was the proper one to determine the amount necessary for that purpose. This was done by giving her, in her own right, a valuable property, worth about \$30,000. Mrs. McCartney, her deceased sister, though dead, was equally an object of the testator's affection, and the only way he could make her equal with the living daughter, and thereby give effect to what may be supposed the promptings of affection, was through the appellant, her son and only heir. How could this be done? Manifestly, in but one way—that is, by giving to him an amount equal to that given to the living daughter—the very thing that was done.

The testator alone had the right to determine what would be a reasonable and proper provision for the living daughter, and for the appellant, as the sole representative of his deceased daughter. This he did, and we perceive no ground for questioning its liberality or sufficiency, even if we had the right to do so, which we have not. In all this, we see nothing to justify a departure from the general rule requiring a *per capita* division of the estate. On the contrary, we think it affords additional reasons why the rule should be adhered to in this case. After having made this equal and liberal provision for the living daughter, and the heir and sole representative of the dead one, there was yet a large residuum of the estate to be disposed of. That, as we construe the will, he gave to such of his grandchildren, Harry McCartney included, as should be living at the time of distribution—or, in other words, when the youngest child of Mrs. Orburn should attain the age of twenty-one years. Those of the grandchildren who are living at that time, and take at all, will take as the will provides—share and share alike. As it is a gift or devise to take effect at a future time, it follows that it will fail as to such of the grandchildren who happen to die before that time.

For the reasons stated, the decree of the court below, except in so far as it relates to the sixty-seven lots above mentioned, is reversed, and the cause remanded, for further proceedings, in conformity with this opinion.

Decree reversed in part and in part affirmed.

Mr. Justice MAGRUDER, having been of counsel in the court below, took no part in the decision of this case.



INDEX.

ACCORD AND SATISFACTION.

See LEGACIES, 5.

AFTER-ACQUIRED REAL ESTATE.

Section 2323 of the Code, which provides that "property to be subsequently acquired may be devised, when the intention is clear and explicit," has the effect only to extend to real property the rule which before existed at common law in regard to personalty; and the meaning of the section is, that subsequently-acquired property shall be held to pass by the bequest, whenever the intention of the testator to have it so pass is fairly to be inferred from the provisions of the will, when constructed according to the established rules for the construction of such instruments. Accordingly, where the testator devised the remainder of his personal property and the whole of his real estate to plaintiffs, *held*, that it is carried to plaintiffs' real estate, the title of which the testator acquired after the execution of the will in question. *Briggs v. Briggs*, 489

AGREEMENT TO DISPOSE OF PROPERTY BY WILL.

One may so bind himself to dispose of his property in a certain way by will that, upon his failure to do so, the agreement, if clearly established, may be enforced after his death against his legal representatives. *McKeegan v. O'Neill*, 517

ANNUITY IN LIEU OF DOWER.

See DOWER, 3.

ANTE-MORTEM PROBATE.

A statute that provides for the probate of a will before the testator's death, leaving him with power to alter or revoke it, or, by removal out of the jurisdiction, to escape the effect and operation of it, is inoperative and void. The proceedings in such a probate could not be conclusive or in any proper sense judicial. *Nemo est haeres viventis*. *Lloyd v. Wayne Circuit Judge*, 1

ANTE-NUPTIAL AGREEMENT.

An unmarried woman executed a will; and, on the same day, she and her intended husband entered into an ante-nuptial agreement, providing that she should retain absolute control of all her property

ANTE-NUPTIAL AGREEMENT—continued.

after marriage; that she should have full and unrestrained right to dispose of the same; that, at her death, such property should descend according to the terms of a will executed prior to the marriage, free from all legal right of her husband; and that the marriage should not work a revocation of the will, nor affect her right to alter the same during the marriage. On the next day the parties to the agreement were married, and lived together until her death, no issue having been born of the marriage. *Held*, that the execution by the will of power of appointment in the ante-nuptial agreement was not revoked by the marriage. *Osgood v. Blin*, 97

APPORTIONMENT.

See DOWER, 3.

ATTESTATION.

Under the statute of Indiana it is not necessary that the subscribing witnesses to a will shall attest it at the same time and in the presence of each other. *Johnson v. Johnson*, 329

See EVIDENCE, 1, 4.

BEQUEST.

1. Where a testator charges certain property given to his children with a "comfortable support" for two of his sisters "equal to what they now have," a trust is created in favor of the sisters for a fixed support, such as they were receiving from the testator at the date of the will, without reference to the performance of any services by them. *Alsup v. Clarke*, 497
2. Where a testator made the following provision in his will, "I also, after paying all debts and claims against my estate, bequeath and devise the remainder of my estate to be equally divided between the board of foreign and the board of home missions," evidence *dehors*, the instrument is competent to show to what or to whom the gift belongs. *Gilmer v. Stone*, 68

See CHARITABLE USE, 1, 2, 3, 10.

CHARITABLE TRUST.

See PERPETUITY, 1, 2.

CHARITABLE USE.

1. A bequest was made to the "Omro and Algoma Union Cemetery Association of Omro." There was no corporation of that name, but there were corporations called respectively the "Omro Cemetery Association" and the "Union Cemetery Association," both having grounds in Omro. The members and incorporators of the latter included inhabitants of the towns of Omro and Algoma. *Held*, that extrinsic evidence of the above facts was admissible, and that

CHARITABLE USE—*continued.*

the last-named corporation was the one intended. *Webster v. Morris*, 158

2. A bequest of a sum not exceeding \$2,000 to a cemetery association "for the purpose of assisting in building a chapel on or near the cemetery grounds," with a direction that if the association will not build such chapel then it use the income from the sum bequeathed in improving the grounds, is valid. *Id.*

3. A bequest of money was made to the "First Presbyterian Church of the Village of Omro," with directions that the sum bequeathed be kept as a perpetual fund for the use of said society, and that one half of the interest arising therefrom be used in defraying the expenses of the society, "and the balance distributed and used for the relief of the resident poor." *Held*,

(1) Extrinsic evidence was admissible to show that the "First Presbyterian Society of the Town of Omro" was intended.

(2) A beneficial interest vested at once in the church corporation, and the bequest violates no rule against perpetuities.

(3) The direction as to the relief of the resident poor was for a charitable purpose, referred to residents of the town of Omro and of the village included within its limits, and was sufficiently definite and certain to be carried into execution. *Id.*

4. A bequest was made to the testator's grandson, the income of which was to be used for his support until a certain age, when the principal sum was to be paid to him "provided he has in the meantime learned some useful trade, business, or profession, and is of good moral character; my executors to determine whether said child has fully complied with said proviso," &c. *Held*, that the condition is not indefinite or uncertain, is not contrary to good morals or public policy, and is valid. *Id.*

5. A direction that upon a contingency mentioned a certain sum be expended by the executors "for charitable purposes" at large, is too indefinite to be executed. *Id.*

6. Where a bequest is for two or more alternative uses of a charitable nature, and one of them is void for uncertainty, the whole gift does not therefore fail. *Id.*

7. Where a will treats the whole estate as personal property, directing the payment of all gifts in money, the executors have authority, by necessary implication, to convert real estate into money. *Id.*

8. Executors should administer the estate according to the will, although the duties thereby imposed include such as are usually performed by trustees. *Id.*

9. A bequest to selectmen "for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows

CHARITABLE USE—*continued*.

- and orphans," in a designated town, is not void for uncertainty. *Beardsley v. Selectmen of Bridgeport*, 398
10. Where a testator directed that his residuary estate should be divided into two parts, and that one part should be paid to a religious corporation and the other to a designated college, and gave the residuum to his executors in trust for the payment of the bequests and legacies, with power to sell and convert the estate, real and personal, into money, it was held that the trustees took no title to the property under the will, but that it descended to the heirs of the testator, and that the gifts to the religious corporation and to the college were void. *Chamberlain v. Taylor*, 508
11. A bequest as follows: "I authorize my executrix to disburse from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars," is invalid, being neither the creation of a trust, nor a gift to the executrix, and a bequest in the following language: "I authorize, empower and direct my wife to permanently dispose of the same" [twenty-five dollars per annum, the income of a certain fund] "for such charitable purposes as she may deem proper," is void for uncertainty. *Bristol v. Bristol*, 383
12. A municipal corporation may hold property in trust under a will for charitable uses, and may be compelled to execute such a trust. *Peynado v. Peynado*, 483
13. A bequest, the object of which is "the establishment of a permanent fund for the charitable assistance and benefit of indigent, unmarried Protestant females over the age of eighteen, residents of B.," which the testator directs to be transferred to the "Protestant Widows' Society of B., to be forever held and managed," &c., and if this cannot lawfully be done, then, that the trustees shall obtain an act of incorporation for a charitable institution under the name of the "Burroughs Home," to which the property shall be transferred, is in all respects legal, and may be carried out. *Tappan's Appeal*, 193

See CONDITION PRECEDENT, 3, 4, 5.

CODICIL.

1. The execution of a codicil effects the republication of a will, so that both the will and the codicil speak from the date of the latter. *Hatcher v. Hatcher*, 439
2. Where a testator made a codicil to his will in the following language: "Whenever the youngest of my grandchildren shall attain the age of eighteen years, the respective shares, the income of which is given to my sons, shall be divided in fee equally among their respective children then living, and if any of them shall then

CODICIL—*continued.*

- have deceased, leaving children or other descendants, then such children or other descendants shall take the share which would have belonged to his or her deceased parent or ancestor, had he or she then been living," the devise is void as in contravention of the statute against perpetuities. *Wheeler v. Fellowes*, 76
3. By the sixth clause of his will, made in 1829, a testator devised and bequeathed to his three sons, Edward, James, and Daniel, and the survivors or survivor of them, and the heirs, &c., of the survivor, *for and during the life* of his daughter, Elizabeth Tayloe Winder, "and no longer," his farm in Talbot county, called Knightly, and also the sum of \$5,000, in special trust and confidence, that they should collect and receive the profits and interest thereof, and pay the same over to her, for her sole use and benefit, during her natural life, whose receipts in writing therefor should be a sufficient discharge to the said trustees, her coverture notwithstanding; *and from and after her death*, he devised and bequeathed the said farm and money before given in trust for the benefit of his said daughter, directly, and not in trust, to her child or children, if any, their heirs, &c., equally to be divided between them, share and share alike. By a codicil made in 1834, the testator bequeathed to his two sons, Edward and James, "in special trust *agreeably with the provisions of my said will*, the sum of \$5,000 (in addition to the \$5,000 devised in my said will), also all the servants or slaves and other articles held by me under a bill of sale from Edward S. Winder, and all servants or slaves of mine which may be in the service or possession of the said Edward S. Winder, or living on the farm called Knightly, at the time of my death, for the use and benefit of my daughter, Elizabeth Tayloe Winder." *Held*,
4. That the additional bequest of \$5,000, and of the proceeds of the sale of the slaves mentioned in the codicil, was for the life of Mrs. Winder only, without remainder to her children, and passed at her death to the three sons of the testator, under the residuary clause of his will. *Buchanan v. Lloyd*, 80
5. Whenever it is rendered necessary or proper, for determining the rights of parties, that the opinion of the court should be taken as to the proper construction of a will, and the necessity for such resort has been occasioned by the doubtful or ambiguous terms employed by the testator, it is proper to award the costs against the residuary fund of the estate. *Id.*

CONDITION PRECEDENT.

1. Where a legacy is given upon a condition precedent, not performed, the legacy falls into the residue; and when a legacy lapses, there being no residuary bequest, the subject-matter of the legacy will

CONDITION PRECEDENT—*continued*.

go to the next of kin as estate undisposed of under the will.
Mills v. Newberry, 318

2. Where a bequest is accompanied by words expressing a command, recommendation, entreaty, wish, or hope, on the part of the testator, that the donee will dispose of the property devised, in favor of another, a trust will be created—first, if the words, on the whole, are sufficiently imperative; second, if the subject be sufficiently certain; and third, if the object be also sufficiently certain. *Id.*
3. A devise or bequest for a public charitable use is favored in law, and a will giving the same should receive a more liberal construction than will be allowed in gifts to individuals, and courts of equity have gone great lengths by creating implied or constructive trusts from mere recommendation and precatory words of testators; but in modern times the disposition is to give the words used their natural and ordinary sense, unless it is clear they are used in a peremptory sense. *Id.*
4. Where a devise is made in favor of a particular person, with a general intention in favor of a class to be selected by such person, whose duty it is made to execute the power given, the court will not permit the object of the power to suffer by the neglect or refusal of the donee, but will fasten upon the property a trust for the benefit of the class, or carry into effect the testator's general intention. The failure of the particular mode by which the charity is to be effected will not defeat the charity, but equity will substitute another mode to give it effect. *Id.*
5. To constitute a valid trust by a devise, three circumstances must concur: sufficient words to raise it, a definite subject, and a certain or ascertained object. If the subject of the charity is not certain, no trust arises. If the words by which the trust is expressed, or from which it may be implied, give the first taker the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, the subject can not be considered certain, and a court of equity will not create a trust. *Id.*

See HOLOGRAPHIC WILL.

CONDITIONAL LIMITATION.

1. Where there is a devise or bequest to one absolutely, and in the event of his death, to another, it is the settled rule that the words of contingency refer to a death in the lifetime of the testator; so also where the devise over is not dependent solely upon the event of death, but upon a death in connection with some collateral event, as, *e. g.*, death without issue, death without children, and the like. *Vandersee v. Slingerland*, 61

CONDITIONAL LIMITATION—*continued*.

2. This latter extension of the rule rests more upon authority than upon reason, and the tendency of the courts in this country is to lay hold of slight circumstances in the will to vary the construction, and to give effect to the language of the testator according to its natural import. *Id.*

CONSTRUCTION.

1. Where a devise is made to a class of persons not named, "as heirs at law" of the testator, so that reference has to be made to the statute to ascertain the persons who constitute his heirs, the provisions of the statute as to the quantity each shall take must also govern. In such case the estate devised will be divided among his heirs, as in cases of intestacy. *Kelley v. Vigas*, 815
2. A will provided as follows: "After my lawful debts are paid and discharged, I give, bequeath, and dispose of as follows, to wit: To my beloved wife, M. J., all that is in my possession at the time of my decease; and also my wife have right to sell the estate, if that will be her choice. And after my wife's decease, the property to be parted to my dear children in equal shares." *Held*, that the widow took, under the will, only an estate for life in the property, with power to sell such life estate, and that the children took, in equal shares, a vested remainder in fee. *Jones v. Jones*, 806
3. The provisions of a will, so long as they are lawful, must be so construed as to carry out the evident intention of the testator. The executor of a will may be at once trustee and beneficiary under it. *Cummings v. Corey*, 222
4. The testator gave an annuity of \$200 to his sister, and directed \$8,800 to be paid at her death to her children "and their representatives, if deceased, excepting" W. At the date of the will, eight of the sister's children were living, and two deceased, one of whom was the mother of W. and the plaintiff: *Held*, that it was clearly not the intention of the testator to exclude the issue of the two persons deceased; and that the plaintiff was entitled to share in the bequest as a primary legatee. *Bronson v. Phelps*, 281
5. When a testator makes a specific devise of a tract of land, and then sells a portion of the tract, and afterwards repurchases that portion, the whole tract will pass to the devisee on the death of the testator, if it is manifest from the terms of the will that it was the intention of the testator to dispose of all the property which he might own at the time of his death. *Hopper, Estate of*, 151
6. A testator by his will gave to his wife the use of his furniture, pictures, and books; and provided that "all such articles as are not consumed in the use, and shall remain in existence at my wife's marriage or decease, shall then go to my children." The will also gave to the wife all his estate, real and personal, to hold during

CONSTRUCTION—*continued.*

- her widowhood, and further provided as follows: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." *Held*, that, under the last clause, the children of the testator took vested interests. *Gibbens v. Gibbens*, 92
7. Under a bequest to certain children and grandchildren equally, the legatees take *per capita* when there is nothing in the will to indicate a different intention on the part of the testator. *Kimbro v. Johnston*, 495
 8. Where the intention of a testator to give a fee or other entire interest in the land does not clearly appear from the words used in the clause of the will devising the land, resort may be had to the introductory clause to explain their meaning; and where the word *property* is so used in the former clause as to leave a doubt as to the testator's intention, and the same word is used in the latter clause, and such clause clearly shows an intention upon his part to dispose of all his estate, it will be held that the fee, or other entire interest in the land, was intended to be given, and passes to the devisee, the other parts of the will consisting with such an intention. *Robinson v. Randolph*, 447
 9. No particular form of words is necessary to the creation of a separate equitable estate. It may be declared in express terms, or inferred from the provisions of the settlement as to the mode of enjoying it. *Id.*
 10. No technical words are necessary to a devise of a fee simple estate in land. The word *property*, in the words of gift, or dispositive part of a will, carries the fee or other entire interest of the testator in the land, unless it is otherwise shown by the will that it was his intention to give a less estate. *Id.*
 11. A father devised eighty acres of land to his daughter. Considering the item giving it to her, and other parts of the will, it is held that he gave his entire interest in the land. The same item of the will provides as follows: "I desire it to be well improved, and to have a good tenement house built upon it. This property I desire to secure to her so that neither she nor her husband can ever dispose of it. I appoint J. J. D. trustee, to support these bequests according to the tenor of the same." Subsequently to the testator's death the daughter married, and is still under coverture. *Held*, that the legal title is in the trustee and that the property is the daughter's separate, equitable estate, subject during coverture to the restraint imposed upon the power to dispose of it. *Id.*
 12. The words "share," "part," and "portion," as used in wills, are frequently synonymous, especially when applied to property ac-

CONSTRUCTION—continued.

quired from an ancestor, but the word "portion" is the most comprehensive, and includes all the property or estate so received.
Lewis's Appeal, 646

DECLARATIONS OF THE TESTATOR.

See REVOCATION, 3; EVIDENCE, 2.

DEED.

1. A testamentary disposition of property is ambulatory until the death of the testator, when it takes effect; but a deed for an interest in land must take effect upon its execution or not at all. A party cannot make a deed for land and retain its custody, and have it operate as a conveyance only after his death. It takes effect at once or not at all. *Clive v. Jones,* 841
2. A conveyance of land or a deed may be good as a voluntary settlement however, though it be retained by the grantor in his possession until his death, when the circumstances, aside from the retention of the deed, do not show the grantor did not intend it to operate immediately. *Id.*
3. An instrument purporting to be a deed of gift, but inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will. *Skerrett, Estate of,* 37
4. Two instruments in the handwriting of the deceased, attached together, and found among his papers, one being in the form of a letter signed by him and addressed to his sister, and the other purporting to be a copy of a deed of gift from the former to the latter, and it appearing on the face of the letter that the property described in the deed was intended by the deceased as a provision for the sister after his death, held, to be a will and admissible to probate. *Id.*

DEFICIENCY OF ASSETS.

When the possibility of a failure of sufficient assets to meet the legacies named by a testator in his will has not been anticipated and specially provided for by him, the presumption of intended equality prevails between general legatees, as well as equality in respect to the share to be borne in all deficiencies of assets. In the administration of testamentary assets where there is a deficiency of such assets after the payment of debts, expenses, and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. *Emery v. Batchelder,* 377

DESTRUCTION OF A WILL.

See EVIDENCE, 1, 3.

DEVISAVIT VEL NON.

See UNDUE INFLUENCE.

DEVISE.

1. Where property is devised to one absolutely, and in the event of his death to another, the contingency contemplated is held to be a death in the lifetime of the testator only where there is no evidence in the will of a different intention. *New York, Lackawanna and Western Ry. Co., In re,* 503
2. The probate courts of Michigan have, in probate matters, a general, for the most part, exclusive jurisdiction; and their orders cannot be attacked collaterally upon any assumption that evidence was wanting to support jurisdictional allegations; their action, when properly invoked, is presumed to be rightful. *Morford v. Dieffenbacher,* 135
3. A devise of property for the devisee's natural life, with authority to dispose of enough for his support, if the use of it should be insufficient, gives only a life estate with conditional power of disposal. And so long as any money bequeathed by the will is available for the devisee's support, the real property cannot be sold for that purpose. *Id.*
4. A fund provided for the "support" of a person cannot be appropriated to the building or completion of a dwelling-place. *Id.*
5. A testator devised to his wife as follows: "All my real estate, together with any and all right, title, and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire, to remain hers so long as she shall remain unmarried after my decease. But if she shall marry again, then from that time she shall be entitled to, and receive only one-third part of all that remains. It is my desire and will that said real estate shall remain as it is for twenty years, giving all the income thereof to my said wife, but authorizing her, in case of necessity, to sell any part thereof for her support and maintenance during her widowhood" with no devise over. The widow died without having married again. *Held:* 1. That the widow, by clear and apt words of the will, took a life estate only. 2. That the contingent authority to sell for her support during the widowhood, did not enlarge her estate to a fee, conferring only a power and not property. *Nash v. Simpson,* 357

See CONSTRUCTION.

DOWER.

1. Dower is not excluded by a provision for the wife of the testator except by express words or necessary implications, nor is the intention to put the widow to an election to be inferred from the extent of the provision, or because she is devisee for life or in fee, or because it seems inequitable to permit her to claim both the provision and the dower. *Konvalinka v. Schlegel,* 310

DOWER—continued.

2. Where the testator gives the residuum of his estate to his executors, to sell and dispose thereof, and to divide the proceeds equally between his "wife and children, share and share alike," the widow is not thereby put to her election, but is entitled to her dower in addition to such a provision for her in the will. *Id.*
3. An annuity given to a widow in lieu of dower is apportionable, and payable for a part of the year, to the time of the annuitant's death. *Cushing's Will*, 295
4. A testamentary gift by a husband to his wife was accompanied by a provision that it should be in lieu of her dower and of any other right to which by law she might be entitled in his estate, real or personal. *Held*, that the gift was intended to be in satisfaction of such rights only, in or to the testator's property, as the law gives her as his widow; and consequently that it will not prevent recovery upon a mortgage (given by him to her before marriage) held by her upon his property. *Russell v. Minton*, 125

ELECTION.

See DOWER, 1, 2.

ESTATE TAIL.

See RULE IN SHELLEY'S CASE, 6, 7.

EVIDENCE.

1. The contents of a lost or destroyed will may, in Illinois, be proved by the testimony of a single witness. *Matter of Page*, 557
2. It is not necessary to the validity of a will that it should be read by or to the person executing it; it is sufficient if the court is satisfied, by competent evidence, that the contents of the will were known to and approved by the person executing it, at the time it was executed as a will. *Worthington v. Klemm*, 415
3. The evidence showed that at the time of the destruction of the will the testatrix was very ill in bed, and in a semi-comatose condition; her attendant handed her the will and immediately afterwards she saw it in the fire, but made no attempt to rescue it. Whether the will was thrown into the fire by the testatrix, or accidentally fell there, was not shown: *Held*, that the evidence did not prove a fraudulent destruction of the will by the attendant. *Kidder, Estate of*, 154
4. A will, executed and presented for probate prior to the statute of 1884, was void when one of the three witnesses to it was the husband of one of the legatees. A statute, which changes the rules of evidence relating to the execution of wills, does not have a retrospective operation. A will must be proved as the law required at the time of its execution. *Giddings v. Turgeon*, 201

See REVOCATION, 3; *UNDUE INFLUENCE*, 1, 6; *ATTESTATION*.

EXECUTORS.

The net income of a specified amount was given by a testator to his widow for life, and his executors were instructed to invest one-third of the principal thereof in designated securities, and were given a qualified discretion as to the investment of the balance. They were also directed to set aside from the remainder of the estate a certain amount, "property which they may deem to be fairly worth that sum," one-half of which should be in safe railroad bonds, or good bonds and mortgages, and the income therefrom should be paid to his children for life, "or to the heirs of any of my children." They were also to "promptly pay or set aside" \$10,000, the income of which should be paid to B. for life, and to B.'s father for his life, should he survive B.; and \$3,000 "shall be set aside and held in trust for each of my grandchildren *living at the time of my decease*, and shall be paid over to each of them, as he or she shall attain their twenty-second year of age." He then gave the residue of his estate to his surviving children, equally, and appointed his executors. *Held*, that the executors were to be also trustees of all these funds; that the gift to the children was not within the rule against perpetuities, because the issue of any child dying should be entitled to the parent's share of the income only until the death of all of testator's children, when the principal should be divided; that a grandchild born two days after testator's death took under the gift to each of his grandchildren "living at the time of my decease;" and that, under the residuary clause, the children took the principal of the gifts to the widow and to B. after their estates for life therein had determined. *Randolph v. Randolph*, 406

EXPERT TESTIMONY.

See UNDUE INFLUENCE, 6.

EXPRESS TRUST.

See CODICIL, 2, 3, 4; CHARITABLE USE, 10, 12, 13.

FOREIGN WILL.

1. Where there is a testamentary gift of property to one person and the children of another, all the beneficiaries, in the absence of a contrary intention to be gathered from the context, will take *per capita* and not *per stirpes*. *McCartney v. Osburn*, 594
2. A decree of a court of competent jurisdiction in another State, determining the nature and extent of the interests given to the several devisees in such State. *Id.*

See WILL OF A NON-RESIDENT.

GIFT IN SATISFACTION OF DEBT.

A husband received \$1,000 from his wife to invest for her, and paid her the interest thereon for the first year. By his will and verbal admissions he recognized his indebtedness to her. By a subsequent will he provided for the payment of all his just debts, "if any," and gave her \$2,000, payable in one year after his death, and the interest on \$4,000 during her lifetime, and stipulated that these gifts should be in lieu of her dower "or any other claim she may have against my estate." *Held*, (1) that the relation of the testator to his wife was that of a trustee; (2) that the statute of limitations did not run against her; (3) that the liability was not discharged by her general statements as to the motive of the transaction, or as to her having released her husband from liability; (4) that the testamentary gifts, having been accepted by her, the claim was thereby satisfied. *Rusling v. Rusling's Admr.*, 251

HOLOGRAPHIC WILL.

A testament in these words, "If any accident should happen to me that I die from home, my wife shall have everything I possess," &c., is a valid will, and the widow will take thereunder, even though the testator die at home. *Likefield v. Likefield*, 478

INCOME.

1. Where a testator leaves money in trust, the income from which is to be paid to a specified beneficiary, the bequest being made payable to the trustee within one year from the testator's death, at the convenience of the executors, it will not carry interest until the end of a year from the testator's death. *Bartlett v. Slater*, 180
2. A gift of income from a fixed time is not the gift of an annuity. *Id.*

INTEREST.

A testator by his will directed his executors to set apart the sum of \$20,000 in gold, and let it remain as so much unproductive capital, not even lending it on interest, and on the day that his great-granddaughter (naming her) arrived at the age of twenty-one years, to pay over to her the said sum in gold as a birthday present, the legacy not to vest in her until that day. The executor collected the requisite amount of funds, and then loaned the same on time, at the rate of ten per cent. per annum, payable in gold. *Held*, that the legatee was entitled to the interest. *Whitworth v. Ewing*, 469

See INCOME, 1; LEGACIES, 4.

LATENT AMBIGUITY.

See BEQUEST, 2.

LEGACIES.

1. The law of the *situs* of immovable property governs exclusively as to all rights, interests, and title in and to the property, and as to the capacity or incapacity of a testator, and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner of its disposal for the payment of debts. *Williams v. Nichol*, 43
2. Courts of equity in the State in which lands are situated have exclusive jurisdiction as to legacies charged upon them. The acceptance of a devise of land renders the devisee personally liable for a legacy charged upon the land. Courts of equity have power to remove trustees for neglect or breach of duty, but will not remove them for every mistake or neglect of duty, but such only as endanger the trust property, or show a want of honesty or capacity to execute their duties, or a want of reasonable fidelity. A trustee appointed by a testator will not be removed for insolvency, nor required to give bond, when the testator has not required a bond and the bill does not show that he is less solvent than when he was appointed. *Id.*
3. A testator by his will gave pecuniary legacies to certain persons, and provided that, if any of them "shall die before my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." One of these legatees died in the lifetime of the testator, leaving as his nearest relatives a brother and three nephews, sons of a deceased brother, all of whom survived the testator. *Held*, that the brother of the legatee was entitled to the legacy, to the exclusion of the nephews. *Swasey v. Jacques*, 419
4. Legacies, unless otherwise controlled by the will, draw interest after one year from the probate of the will; and the rule is not affected by the fact that the executor is unable to gather in the assets and pay the legacy within the year. *Vermont Baptist Convention v. Ladd*, 305
5. When there is a dispute between an executor and a legatee as to the amount of interest due on a legacy, on account of the expense and delay caused by a long litigation carried on for the protection of the estate, an acceptance by the legatee of a sum less than the one due on the legacy is an accord and satisfaction, if the payment is made upon the express condition that it shall be in full for the balance due, and the money accepted without protest against such condition. *Id.*

LEX REI SITUS.

See LEGACIES, 1.

LIFE ESTATE.

1. A bequest of personal property to a wife for use during her life, with power to control and manage the same, and at her death all remaining to go to grandchildren, vests in her life interests, but with no absolute power of alienation. One having an estate in remainder in personal property may maintain a suit against the life-owner for the protection of his interest. *Goudie v. Johnston*, 351
2. A testator by his will devised and bequeathed all his real and personal property to his wife for life, and provided that at her death any and all of the property and estate so granted, "or any part of the same then left by her," should be divided among his children. The will also contained a provision, as follows: "I make this a condition, that my said wife shall, out and from said property left her, provide for the maintenance and education of my children." A power to sell and convert the property is also given to the executors. *Held*, that upon his decease a life estate in the realty vested in the wife and a remainder in fee in the children, and in like manner similar interests were created in the personalty, and in case of sales the devisees or legatees would take similar interests in the proceeds. *Held*, also, that by the terms of the will an implied power of disposition is given to the widow of so much of the capital fund or *corpus* of the estate as may be reasonably necessary for her own support and the maintenance and education of the children, after first applying the income thereto; that the provision for the widow is made in consideration that she shall so provide for the children from the property left her, and that for such purpose, as well as her own support, the income is the primary fund. *Estate of Oertle*, 398

LIFE ESTATES AND REMAINDERS IN STOCKS OR BONDS.

Where, by the terms of a will, the testator leaves money, in trust, to be invested in certain specified interest-bearing securities, "the annual interest, income, and dividends thereof" to be paid to one for life, and "the principal or capital sum aforesaid," upon the death of the beneficiary for life, to be divided among certain of the testator's kindred, if, upon the sale of the securities, after the death of the life-tenant, a sum in excess of the original investment be realized, the surplus belongs to the remainderman, and not to the representatives of the life-tenant. *Accounting of Gerry, In re*, 55

See STOCK DIVIDENDS AND CASH DIVIDENDS.

MUNICIPAL CORPORATION AS TRUSTEE.

See CHARITABLE USE, 12.

NUNCUPATIVE WILL.

Where a decedent lived nine days after making a nuncupative will, and possessed the capacity meanwhile to execute a written one, and could have made such written will, the nuncupative one cannot be sustained. *Carroll v. Bonham*, 389

PERPETUITIES.

1. A devise to two persons named, "their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust to sell, dispose of, invest and manage the same, and appropriate such part of the principal and interest as they may deem best for the aid and support of those of my children and their descendants who may be destitute, and, in the opinion of said trustees, need such aid," is void. It cannot be upheld as a public or charitable trust, and it is invalid and without effect as against public policy. *Kent v. Durham*, 14
2. A bequest of money in trust, to pay a portion of the net income to specified beneficiaries, the remainder of the income to accumulate for ten years after the testator's death, and the estate all to go ultimately to the testator's grandchildren, created a vested interest for such of the children as were living at the death of the testator. Such a disposition of property is not in conflict with the statute against perpetuities. *Farnam v. Farnam*, 103
See CHARITABLE USE, 3; CODICIL, 2.

POWERS.

1. The donee of a power may execute it without referring to it, and without taking any notice of it, provided the intention to execute it really appears. *Patterson v. Wilson*, 25
2. If there is no express reference to the instrument creating the power, there should be some special reference to the subject on which it is to operate, or some circumstance leading to the conclusion that its execution was intended. *Id.*
3. A clause in a will which empowers the executors "to sell and convey any real estate," will authorize a conveyance by two executors, where the third has renounced his trust. *Vernor v. Coville*, 184
4. Such language in a will is presumed to have been made with reference to the statutory provisions relating to wills and conveyances by executors thereunder, and must be construed as if it embraced those provisions. *Id.*
5. A power to sell land given by the testator to an executor does not, in the absence of statutory provision, devolve upon an administrator *cum testamento annexo*, unless the intention that it should do so clearly appears from the will itself. *Hodgin v. Toler*, 543

PRECATORY WORDS.

See CONDITION PRECEDENT, 2, 3.

PRESUMPTION AGAINST PARTIAL INTTESTACY.

Where a testator, after sundry pecuniary legacies to his children and the gift of a life estate in his realty to his wife, made the following residuary bequest: "All the residue of my estate of whatever kind I give to my wife," but made no disposition of the fee of his realty, it was held that the widow was entitled to the fee in addition to the life estate expressly given her, in her husband's lands. *Warner v. Willard*, 293

PROBATE.

See REVOCATION OF LETTERS OF ADMINISTRATION.

PROVISION FOR A WIDOW.

Where a testator by his will provided, *first*, for the payment of debts, and, *secondly*, gave the homestead premises, and the furniture, and all other personal property connected therewith, to his wife, and directed that, after satisfying these provisions of the will, all the residue of his property, real and personal, should be distributed as follows, viz.: *First*, one equal undivided one-third part to his wife, which he ordered to be given her clear of all incumbrances; and, *second*, the remaining two-thirds to be divided among other relatives: *Held*, that such residue of the realty as well as of the personalty, is by the will required to be first applied to the satisfaction of debts before any of the personalty named in the second bequest can be so applied, in order to secure to the widow the benefit of such bequest as intended by the testator; and that the claim by the widow of her distributive share of the residue of the real estate, which would be subject to its just proportion of the debts, is inconsistent with the scheme of the will, and that it is manifest from the will that the testator contemplated the disposition thereby of the entire estate as enjoyed by him, and therefore the widow was required to elect between such distributive share and the provisions made for her in the will. *Estate of Gotrian*, 418

See DOWER; WIDOW'S SHARE OF PERSONALTY.

RECEIVER.

1. An essential element in the exercise of the extraordinary jurisdiction of appointing a receiver, is the danger of the entire loss of the property. So, a receiver will not be appointed to take possession of land and receive the rents and profits, unless the plaintiff has established an apparent right to the property, and the insolvency of the defendant is alleged and proved. *Bryan v. Moring*, 8
2. A receiver cannot be appointed in a proceeding to establish a will. *Id.*

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RECEIVER—continued.

3. Where, on an issue of *devisavit vel non*, the jury found that a certain paper writing was the will, and certain persons, parties to the action, were in possession of the land of the testator, claiming under a prior script, it was held error to appoint a receiver of the rents and profits, especially when there was no allegation of insolvency against the party in possession. *Id.*

REMAINDER.

See DEVISE, 1.

RESIDUARY BEQUEST.

See CONDITION PRECEDENT, 1.

RESIDUARY DEVISE.

1. Under a testamentary direction that after the death of the testator's wife the residue of his estate "shall be divided among my several children, share and share alike; and in the event of any of my said children dying before my said wife, and leaving issue them surviving, then such issue shall be entitled to and receive their parent's share, the same as said parent would receive, were he or she then living," the children of a son who died in testator's lifetime, and before the making of the will, and before the death of the widow, were held entitled to their father's share. *Outcalt v. Outcalt*, 272
2. A testatrix, after directing the payment of her debts and funeral expenses, gave to one of her daughters the interest of one equal undivided sixth part of all her estate for life, with remainder over, and made the same bequest to complainant. She then gave two pecuniary legacies, and then gave all the rest of her estate to her executor "in trust for the execution of her will," and gave to another daughter the income of such residue for life, with remainder over. The personal estate is \$700, the real, \$42,000, and the debts about \$14,000: *Held*,
 - (1.) That complainant's share, although evidently given in trust, is not subject to the trust of the residue, and consists of one-sixth of the whole estate, after the payments of the debts and expenses, for which the court may appoint a trustee;
 - (2.) That if the real estate can be equitably divided, complainant's share thereof may be set off for her benefit, and she may enjoy it as a tenant for life, but, if not thus partible, there must be a conversion. *Terry v. Smith*, 277
3. If the language is not doubtful, the mere fact that the reasons assigned by the testatrix for discriminating in the gifts to certain legatees are false in fact, cannot control the construction of her will, although such construction may fail to effectuate her purpose. *Id.*

See VESTED REMAINDER; VESTED AND CONTINGENT INTERESTS; DEVISE.

REPUBLICATION.

See CODICIL, 1.

REVOCATION.

1. Marriage and issue born, in general, operate to revoke a will previously made. *Baldwin v. Spriggs*, 85
2. The revocation of a will is not affected by the death of legatees or devisees named in it; nor by the marriage of the testator, there being no issue of the marriage; nor by the alienation of the larger portion of his estate which was specifically disposed of by the will; nor by the acquisition of other estate to an amount much greater than he possessed at the time the will was made; nor by the concurrence of all the above circumstances. *Hoitt v. Hoitt*, 529
3. Declarations of a testator to the effect that he understood a will made by him was revoked, are not admissible on the question of revocation. Declarations of a testator as to his intention in the disposition of his property, are not competent evidence from which to ascertain his intention as expressed in the will. *Id.*

See ANTE-NUPTIAL AGREEMENT.

REVOCATION OF LETTERS OF ADMINISTRATION.

Where a will is found and admitted to probate after a grant of letters of administration, the letters will be revoked, and, in the absence of a statutory regulation, there is no limit of time within which a will must be offered for probate, provided that it is so offered within a reasonable time after it is discovered. *Rebhan v. Mueller*, 487

RULE IN SHELLEY'S CASE.

1. In the construction of wills the intention of the testator must be sought for and ascertained. If that intention is not in conflict with the settled policy of the law, it will always be respected and allowed to operate. *Henderson v. Henderson*, 19
2. The intention of the testator must in most cases be gathered from the peculiar terms of the instrument under consideration, without reference to artificial and technical rules of interpretation. *Id.*
3. In this State, even before the Act of 1862, ch. 161, the rigidity with which the rule in Shelley's case has been applied elsewhere, seems to have been somewhat relaxed; and it has been held that the word "issue," in a will, is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise, and the apparent intention of the testator. *Id.*
4. Where the testator manifests an intent to give the first taker only an estate for life, and uses the words "issue," "sons," "children," or "descendants," the case will be withdrawn from the operation of the rule. *Id.*
5. In regard to executory trusts, in courts of equity the rule will be

RULE IN SHELLEY'S CASE—*continued.*

adhered to only in cases literally within it, and where circumstances take the case out of the letter of the rule, it will be held subservient to the manifest intention which led to the creation of the trust. *Id.*

6. A devise to a trustee with no power of control or disposition, is ineffective, and the estate vests directly in the beneficiary. That which would have been an estate tail at common law is an absolute estate in fee under the statutes of this State. *Allen v. Craft*, 365
7. The word "heirs" has a fixed, legal meaning, and can only be held to mean children, or to be a word of purchase, when it is clear that such was the intention of the testator. When the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Superadded words which merely describe or specify the incidents of the estate created by such a word of limitation as the word "heirs" do not cut down the interest of the devisee. The word "issue" is ordinarily a word of limitation of the same force as the word "heirs." *Id.*
8. Where a will contained the following provision, "I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate," describing it, "to have the use of the above described land during said James' lifetime, and after his death to the heirs of his body bequeath [begotten] in lawful wedlock, and none others. I also give and bequeath to John C. Rachels, my son," certain described real estate, "said John to have the use of the same during his life, and, after his death, to his children bequeath [begotten] in lawful wedlock," the devisee took only a life estate in the land devised, the fee going to his children. Where the intention of the testator is plain, the rule in Shelley's Case will not be allowed to defeat it. *Millitt v. Ford*, 384

SEPARATE EQUITABLE ESTATE.

See CONSTRUCTION, 9.

STOCK DIVIDENDS AND CASH DIVIDENDS.

1. Where a testator left to his executors certain shares of stock in trust, "to receive the rents, interest and income," and to apply the net amounts thereof to the use of his widow during her life, with remainder over to designated beneficiaries, a dividend declared upon this stock on April 14, and made payable May 2, the testator having died April 20, was held to be principal and not income, and therefore to belong to the remaindermen and not to the tenant for life. *Matter of Kernochan*, 260
2. The life tenant is entitled to the dividend declared after the testa-

STOCK DIVIDENDS AND CASH DIVIDENDS—*continued.*

tor's death, although made from net earnings accumulated before that event. *Id.*

3. The option given to the stockholders to take at par certain new issues of stock or bonds does not belong to the life-tenant, but must enure to the benefit of the remaindermen. *Id.*

See LIFE ESTATES AND REMAINDERS IN STOCKS OR BONDS.

TRUSTS.

See RULE IN SHELLEY'S CASE, 5; CHARITABLE USE.

UNDUE INFLUENCE.

1. In a proceeding to probate a will, a legatee is not disqualified from testifying to matters which, if true, must have been equally within the knowledge of the testator. Section 7,545 has no application to such a case. *Schofield v. Walker*, 211
2. Where the probate of a will is contested upon the ground of undue influence exercised over the mind of the testatrix by her pastor and his wife, in whose family she was a boarder, and where the trial judge correctly and fully instructed the jury upon the subject of undue influence, it was not error to refuse the following instruction: "If you find that a confidential relation existed between the parties, as the contestant claims, and that Mrs. Disbrow reposed her confidence in Mr. and Mrs. Schofield, and that they had such influence over her as is claimed, that influence must be kept free from selfish interest and cunning and overreaching bargains, and in their dealings with her no selfish advantage must have been taken of this influence. Such influence must be exercised in good faith and not abused. It must be directed with reference to Mrs. Disbrow's best interest, and not to further their own selfish interests at her expense." The language was inapplicable to the case before the court. *Id.*
3. Neither was it error, in view of the charge as given, for the court to refuse to give the following instruction: "If you find this confidential relation in fact existed, and the Schofields possessed the influence over Mrs. Disbrow as it is claimed they did, and that she reposed her trust and confidence in them as claimed, the situation would impose a solemn obligation upon the Schofields to abstain scrupulously from attempting to derive any pecuniary benefit to themselves which selfish motives might suggest at the sacrifice of those interests which they were bound to protect; for, if confidence is reposed in that matter, it creates a high and sacred trust, and an obligation and duty which must be observed. If confidence is reposed, it must be faithfully acted upon, and pre-

UNDUE INFLUENCE—*continued*.

served from any intermixture of imposition. If the means of personal control are given, they must always be restrained to purposes of good faith." The language is obscure when applied to the facts of the case. The rule of technical morality does not require that a person occupying confidential relations to a testator must do or say nothing to influence the action of the testator in his favor. If the influence exerted is not what in law is termed "undue influence," technical morality is not violated by its use. *Id.*

4. Influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeal to the affections, cannot properly be termed undue influence in a legal sense ; but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do, against his will, what he is unable to refuse, is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another. *Id.*
5. The mere existence of an improper influence is not evidence of the exercise of undue influence. *Sunderland v. Hood*, 433
6. Where the testator's faculties, at the time of making a codicil to his will, are impaired by age and disease, and the codicil changes the will essentially and in favor of the confidential adviser of the testator, the burden of proof is upon the proponent to show affirmatively the state of the testator's mind, and that he knew, approximately at least, the condition of his estate and the effect of the codicil. *Yardley v. Cuthbertson*, 562

VESTED AND CONTINGENT INTERESTS.

No estate will be held contingent unless very decided terms are used in the will, or it is necessary to hold the same contingent in order to carry out the other provisions or implications of the will ; thus, the testator bequeathed his estate to trustees in trust for his daughter. They were directed to apply, if necessary, the whole income to her education and maintenance, and, when she should arrive at eighteen or be married, it was discretionary with them whether or not to deliver to her the whole estate. In case the legatee died before eighteen, the estate was disposed of by bequests over. She was never married, and died at twenty-three, with the funds in the possession of the trustees. *Held*, that the daughter took a vested

VESTED AND CONTINGENT INTERESTS—continued.

estate at least when she was eighteen, which, upon her decease, passed to her devisees. *Weatherhead v. Stoddard*, 284

See CONSTRUCTION, 6.

VESTED REMAINDER.

A testator devised certain lands, in trust, for the benefit of his wife and five children for their lives, and, after the death of the surviving child, the trust to cease and the land be sold and the proceeds divided among the "right heirs" of his children as tenants in common, the issue of any child to take their parent's share: *Held*, that such grandchild had a vested remainder in the residuary devise, subject to open and let in any brother or sister. *Ballentine v. Wood*, 244

See CONSTRUCTION, 2.

WIDOW'S SHARE OF PERSONALTY.

A widow is entitled to one-third of her husband's personal estate, notwithstanding that more than two-thirds of it is given to the children by will. *Estate of Lyon*, 558

WILL IN AN UNKNOWN LANGUAGE.

A will drawn in accordance with the instructions of a person of sound mind, and executed by him in due form of law, with full and accurate knowledge of its contents, is valid, although it is written in the English language and the testator did not understand that language. *Will of Walter*, 299

WILL OF A NON-RESIDENT.

The complainant claimed that as a residuary legatee, he was entitled to a part of a fund in defendant's hands, under what the complainant insisted was a void bequest: *Held*, that, as the testator was at the time of his death a non-resident (he lived in New York, where the will was proved), and his will had never been proved in this State, nor recorded here, as authorized by the statute, the complainant was not entitled to relief, although the bill states that the fund is under the control of the defendants, who reside in this State and are the executors of the surviving executor of the will by which the bequest was made. *Van Gieson v. Banks*, 420

See FOREIGN WILL.

WITNESSES.

See ATTESTATION; EVIDENCE, 1, 4.

WORDS AND PHRASES.

"support." *Morford v. Dieffenbacher*, 185

"to sell and convey any real estate." *Vernon v. Coville*, 184

"and their representatives, if deceased, excepting." *Bronson v. Phelps*, 281

WORDS AND PHRASES—*continued.*

"right heirs." <i>Ballentine v. Wood,</i>	244
all just debts, "if any." <i>Rusling v. Rusling's Executors,</i>	251
"or any other claim she may have against my estate."	<i>Id.</i>
"to receive the rents, interest and income." <i>Matter of Kernochan,</i>	260
"issue them surviving." <i>Outcalt v. Outcalt,</i>	272
"heirs at law." <i>Kelly v. Vigas,</i>	315
"issue;" "heirs." <i>Allen v. Craft,</i>	365
"heirs;" "children." <i>Millett v. Ford,</i>	384
"living at the time of my decease." <i>Randolph v. Randolph,</i>	406
"all my estate." <i>Estate of Gotsian,</i>	418
"property." <i>Robinson v. Randolph,</i>	447
"share," "part," "portion." <i>Lewis' Appeal,</i>	466
"comfortable support." <i>Alsop v. Clarke,</i>	497

See CONSTRUCTION; CHARITABLE USE; RULE IN SHELLEY'S
CASE; CONDITION PRECEDENT, 2, 3.



